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# ALSD STUDENT JOURNAL



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## EDITORIAL

“Words, once they are printed, have a life of their own.” So said Mark Twain. He could not have been more adept while describing the process of writing and as to how imperative it is for everyone to imbibe the culture of writing. With the same goal in mind and commitment to such thoughts, the Student Journal Society of Amity Law School, Delhi comes up with the inaugural edition of its bi-annual student-edited, peer-reviewed law journal titled “ALSD STUDENT JOURNAL”. The journal aims to cater to the needs of the legal fraternity by providing inter-disciplinary knowledge on legal issues.

When we decided to traverse this path of legal writing and introduce a new tradition in the college (foundations of which had already been laid down firmly by our distinguished alumni), all that occupied our mind space was to take this journal to every law student of the country, reach out to those whose voices had yet not been heard by the top echelons of the legal community and encourage those people to indulge in the craft of writing who had long forgotten its significance. Apprehensive yet with a steely resolve, as we got down to work out the nitty-gritty’s of a venture so ambitious and yet so achievable, we stood largely humbled with the response that we got. Not taking away anything from the fact that we were resolute in our stand of making this project a huge success, the feelings of uncertainty, indecision and ambiguity struck all of us at one point or the other. Questions like ‘Will we able to pull it off?’, ‘Will there be enough contributors?’, ‘Will people even revert to our Call for Papers?’ and so on plagued us for days together. All these moments of insecurity stood behind us till the time we didn’t receive our first submission. From there on, it’s been a barrage of mails which have, at times (owing to our tight calendar) been difficult to manage. Contributions to the journal have poured in from far and wide; most of them showcasing stellar pieces of legal acumen, and continue to do so; so much so that we already have a bank of articles which are in serious consideration for publication in our next issue.

Being only the inaugural issue, calls for a momentous celebration shall be deemed premature. Yet as we sit down to ponder as to what worked for us, despite the countless hurdles which lay in our path, is the fact that we were flexible in our approach. So even when we had a theme for this issue, “Public International Law”, as you flip through the pages, you’ll notice we’ve not limited our published articles to this theme alone. There were write ups on Taxation Laws, Environmental Law, and Cyber Law etc. which find a place in the ALSD STUDENT LAW JOURNAL. The logic behind this was simple. Not to let a meritorious

piece of work to squander away merely because it didn't adhere to our theme. The motto behind initiating such a venture was to chip in, in our own unassuming ways, to the concept of legal writing and to promote it in a way most suited to law students and professionals in the field of law i.e. publications. Publications which will be accessed by the legal world at large and whereby their work will be made available to everybody who wishes to do an in-depth study on any given topic. Hence, even when we were editing the articles, the thought of having a restricted lot of write-ups never crossed our minds for we intended to accord space to the most earnest and legally sound piece of work. We sincerely hope we've lived up to that promise.

The journal which you hold forth in your hands is a product of countless meetings, brainstorming and hours of deliberations put together. We may not have created perfection but we've tried to come close. Ours being a maiden attempt, we've been lucky enough to be welcomed with a more than warm approach by the legal fraternity and we look forward to their continued support in the near future too, for all our endeavours. We'd also like to extend our kind gratitude to our Institutional Head, Prof. M.K. Balachandran without whose guidance this initiative would have simply remained a dream. The journey has just begun. There are miles to be covered before we count ourselves among the premier journals of the country. However, going by the commitment and response, we like to believe that day doesn't seem very far away into the horizon.

Warm regards

THE EDITORIAL BOARD

ALSD STUDENT JOURNAL

# DEMOCRACY AND HUMAN RIGHTS: A COMPLEX RELATIONSHIP

Cécile Vandewoude\*

## I. INTRODUCTION

The importance of democracy in international law is increasing rapidly. Democracy is for instance used as a membership requirement by various organizations<sup>1</sup> and as a prerequisite for obtaining international financial support<sup>2</sup> or humanitarian aid.<sup>3</sup> The promotion, consolidation, defense or maintenance of democracy is also listed as a goal or fundamental principle of several regional and international organizations<sup>4</sup>. Even wars are currently being fought allegedly in the name of “the promotion and the spread of democracy.”<sup>5</sup>

However, in international law there does not exist a universally accepted definition of democracy. Regardless, there does appear to exist an international consensus on the existence of an indissoluble link between human rights and democracy. However, the exact nature of that link is unclear. It is the purpose of this article to explore the nature of the nexus between human rights and democracy.

Part one will examine how democracy is defined in

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1. For the European Union, see Treaty of the European Union arts. 7, 8 & 49, Mar. 30, 2010, O.J. C 83/13, and Conclusions of the European Council in Copenhagen, June 21-22, 1993, Doc/93/3; for the Organization of American States, see Charter of the Organization of American States arts. 3(d) & 9, Dec. 13, 1951, 119 U.N.T.S. 3.
2. See European Council Regulation 1999/976 art. 7, 1999 O.J. (L 120) 42 (EC).
3. Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 GEO. PUB. POL'Y REV. 1 (2001).
4. Treaty of the European Union, *supra* note 1, arts. 3 & 2; Constitutive Act of the African Union art. 3(g), July 11, 2000, OAU Doc. CAB/LEG/23.15 (2001); Charter of the Organization of American States, *supra* note 1, art. 2(b); Treaty of the Southern African Development Community art. 5, July 17, 1992, 32 I.L.M. 116 (1993); Treaty of Economic Community of West African States art. 4, July 24, 1993, 35 I.L.M. 660 (1996).
5. The legality of the use of force to spread democracy as an element of foreign policy has been referred to as the “Bush Doctrine”. Robert Jervis, *Understanding the Bush Doctrine*, 118 POL. SCI. Q. 365, (2003); Jonathan Monten, *The Roots of the Bush Doctrine: Power, Nationalism, and Democracy*

international law and what methods can be used to do so. Part two will then focus on the nature of the link between democracy and human rights.

## II. DEFINING DEMOCRACY IN INTERNATIONAL LAW

### Democracy a recent phenomenon

Contrary to other political theories such as communism, democracy does not have a(ny) founding father(s). Consequently democracy's scope and meaning has not been developed by a limited number of people during a limited period of time. Conversely, democracy is a very old concept that can be traced back to ancient Greece. Etymologically the word is derived from the Greek "ἄνθρωπος" and "ἐξουσία" which means respectively "people" and "power". Throughout its long history, the concept has had several different meanings, some of which would be considered contrary to today's interpretation.<sup>6</sup> Its current meaning is the result of a century long evolution.<sup>7</sup>

Regardless of this long and rich history, democracy in international law is a recent phenomenon. It was only after the Cold War that international law dared to address the issue of democracy which previously was considered to be a "domestic" issue and thus one not subject to international scrutiny.<sup>8</sup> In the literature this "shift" is explained by the events of 1989-1991 which led to the embrace of democracy in many countries, primarily in Eastern Europe. The "Third Wave of Democratization", to use Samuel Huntington's term,<sup>9</sup> led many

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*Promotion in U.S. Strategy*, 29 INT'L. Security 112 (2005).

6. BERNARD CRICK, *DEMOCRACY: A VERY SHORT INTRODUCTION* (2002); IAN SHAPIRO AND JOSÉ ANTONIO CHEIBUB ROBERT DAHL, *THE DEMOCRACY SOURCEBOOK* (2003).
7. KENNETH GRAHAM, *The Role of Regional Organizations in Promoting Democracy, background paper #7 to the Sixth International Conference of New and Restored Democracies*, [www.icnrd.com](http://www.icnrd.com) (2006).
8. MARC COGEN, *THE COMPREHENSIVE GUIDE TO INTERNATIONAL LAW* 169-170 (2008); Jan Wouters & Cedric Ryngaert, *Democratie en Internationaal Recht*, in *RECHT EN DEMOCRATIE: DE DEMOCRATISCHE VERBEELDING IN HET RECHT* 575 (Maurice Adams & Patricia Populier eds., 2004); Jan Wouters et al., *Democracy and International Law*, 1 N.Y.I.L. 137 (2003).
9. SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1993).



scholars<sup>10</sup>, states and international organizations<sup>11</sup> to think about the idea of democracy as a legal principle. Despite the increased attention for the issue there does not exist a universally accepted definition of democracy.

### **Possible methods to define democracy in international law**

Defining democracy in international law is extremely difficult. Amongst legal scholars, disagreement even exists on whether the concept of democracy can *überhaupt* be defined in a way that is universally acceptable. Some authors claim that democracy is “*the archetype of an essentially contested concept*.”<sup>12</sup> “*As it means different things to different people*” they argue that “*any attempts to define the concept would be meaningless at best and imperialistic at worst*.”<sup>13</sup>

In international law the feasibility of defining democracy appears to be accepted. In the practice of states as exercised within a significant number of regional and international organizations the issue has never been discussed. Similarly, human rights bodies when interpreting the phrase “necessary in a democratic society” have never questioned the possibility of defining democracy. Finally, in the writings of legal scholars the issue barely has come up. The focus of the definition debate is not on whether the concept can be defined, but how it should be defined? The latter question will be addressed next.

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10. See for instance Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. J. 77 (1988); Gregory Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK J. INT'L L. 495 (1996-1997).

11. See references below. For more background information see Nsongurua Udombana, *Articulating the right to Democratic Governance in Africa*, 24 MICH. J. INT'L L. 1209 (2002-2003); Dexter Boniface, *Is there a Democratic Norm in the Americas? An Analysis of the Organization of American States*, 8 Global Governance 365 (2002); Richard Burchill, *The Promotion and Protection of Democracy by Regional Organizations in Europe: the Case of Austria*, 7 EUR. PUB. L. 79 (2001); Christopher Joyner, *The United Nations and Democracy*, 5 Global Governance 333 (1999).

12. Susan Marks, *The “Emerging Norm”: Conceptualizing “Democratic Governance”*, 91 AM. SOC'Y INT'L L. PROC. 372 (1997).

13. *Id.* For more background information on the different perceptions on democracy and human rights see for instance Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUST. Y.B.I.L. 1 (1994); Larbi Sadaki, *Al-Ila Nidam: An Arab View of the New World (Dis)Order*, 17 ARAB STUD. Q. 1 (1995).

From a theoretical standpoint, several methods can be used to define democracy. Within the writings of political scientists comprehensive descriptions can be found of possible methods, some of which will serve as a useful theoretical framework for the discussion here.<sup>14</sup> The fact that the methods are proposed by political scientists and not by international lawyers is of minor importance here as these methods suggest a general methodology which easily can be applied to other fields of research including the area of law. Moreover, as will be illustrated, in international law some examples can be found of concrete implementations of these methods. It should be noted that none of the methods suggested is flawless, which is recognized in the literature.<sup>15</sup>

The first possible approach would be to look at nations generally referred to as democracies and define the concept according to certain features of those systems. Such an approach would not be useful as it is considered to be illogical to define democracy by induction from the practice of one political system. It would be no longer possible to praise that country for being democratic as a society cannot be praised for qualities which belong to it by definition rather than by political contrivance.<sup>16</sup> In addition, it is recognized that a definition of democracy does not necessarily have to refer to a particular society past or present as democracy will always be “aspirational” to some extent.<sup>17</sup>

A second possible method would be to define democracy based on an historical analysis.<sup>18</sup> As mentioned above the current political and sociological meaning of democracy is the result of a centuries long evolution, however democracy in international law is a recent phenomenon. As the start of the legal debate on democracy can be traced to the end of the Cold War, the historical period which can be examined is limited to a period of 20 years,

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14. All four methods are described in DAVID BENTHAM, *DEFINING AND MEASURING DEMOCRACY* 36 (1994).

15. *Id.* at 6-7.

16. *Id.* at 6-7.

17. “Absolute democracy (...) which no society embodies totally” Thomas Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 4 (1994-1995). See also art. 2 of the Universal Declaration on Democracy, Inter-Parliamentary Union (1997) which refers to democracy as “a constantly perfected and perfectible state or condition whose progress will depend upon a variety of political, social, economic and cultural factors.”

18. Such a method was used for instance in Crick, *supra* note 6; Dahl, *supra* note 6.

which is relatively short. It is undisputed that the events of 1989-1990 constituted a breach with the past in international law in particular with regard to the concepts of state sovereignty and human rights. However, since the beginning of the nineties the discussion on democracy does not appear to have progressed significantly.<sup>19</sup> Consequently, to this date no historical evolution may be said to have taken place with regard to democracy's legal meaning, not taken into account the possible consequences of the still ongoing "Jasmine Revolution".<sup>20</sup>

A third possible method would be to define democracy negatively i.e. stating what democracy is not. Such an approach has also been used before in international law for instance the concept "civilians" in international humanitarian law is defined negatively and could be used here.<sup>21</sup> In international law an international consensus exists on the fact an "Apartheid regime" as applied in South Africa<sup>22</sup> and in South-Rhodesia<sup>23</sup> and a

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19. Cécile Vandewoude, *Book Review: Democracy and International Law (by Richard Burchill)* 19 EUR. J. INT'L. L. 234 (2008).
  20. The Jasmine Revolution is an intensive campaign of civil unrest and demonstrations against non-democratic governments. The revolution started in December 2010 in Tunisia and led there to the ousting of President Zine El Abidine Ben Ali in January 2011. The revolution in Tunisia has spread to other Arab countries, including Egypt where President Hosni Mubarak was forced to step down and Libya where a full-scale rebellion has broken out. Protests have also taken place in Algeria, Yemen, Jordan, Bahrain and Mauritania.
  21. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 50, 8 June 1977, 1125 U.N.T.S. 3.
  22. See International Convention on the Suppression and Punishment of the Crime of Apartheid arts. 1 & 2, Nov. 30, 1973, 1015 U.N.T.S. 243. It should be noted that "Western" nations have never signed nor ratified this Convention. However, the crime of Apartheid has been endorsed - albeit in a weaker form - in other instruments for instance in the Geneva Convention Protocol I, *supra* note 22, art. 85, para. 4(c); Draft Code of Crimes against the Peace and Security of Mankind art. 18(f), July 17, 1996, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996), which does not mention the word "Apartheid" but refers to "institutionalized racial discrimination" as species of crime against humanity and article 7 of the Rome Statute of the International Criminal Court art. 7, July 1, 2002, 2187 U.N.T.S. 90.
  23. Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L. L. 1 (1968).
  24. The Nazi-regime was called by the Nuremberg tribunal a "complete dictatorship", INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1945-1946).
  25. Cécile Vandewoude, *The Rise of Self-Determination versus the Rise of Democracy*, 2 (3) GO. J. I. L. 981, 985 (2010).

“Nazi regime”<sup>24</sup> are non-democratic.<sup>25</sup> One could therefore define democracy as a form of governance that does not constitute a regime of Apartheid and/or Nazi regime. Such a method is deemed to be useful in human rights law it has been argued that examining the limits of a certain concept does provide a better insight into its meaning.<sup>26</sup> However, defining democracy negatively would lead to an open-ended definition giving leeway to more discussion and would not provide better insights in what a democracy is.

A fourth method would be to define democracy according to certain basic principles.<sup>27</sup> The latter method is used in international law and will therefore be withheld in this paper.

### **Defining democracy in international law is defining democracy in function of its constituent elements: a minimalistic versus a comprehensive approach**

In international law, a multitude of circumscriptions of democracy can be found. The majority of them appear in policy documents adopted within various international organizations and in the writings of scholars. All of them define democracy in function of its constituent elements. The list of constituent elements tends to differ in all definitions.

In an effort to identify democracy’s core elements, generally two approaches can be discerned within the literature: a minimalistic or formal approach and a comprehensive or substantive approach.<sup>28</sup> Proponents of the former consider democracy to be a way to legitimize governments and a government is considered to be legitimate when it is representative and participatory. This approach is called “formal” as democracy is considered to be a method to producing governments through the mechanism of free and fair elections, while respecting certain human rights mainly reference is made to freedom of expression, assembly and association. This approach is called minimalistic as it considers democracy to be “merely” the sum of various elements such as respect for human rights, respect for the rule of

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26. Gerhard Van Der Schyff, *Het Concept Democratie in het EVRM*, in *RECHT EN DEMOCRATIE: DE DEMOCRATISCHE VERBEELDING IN HET RECHT* 563 (Maurice Adams and Patricia Populier ed., 2004).

27. BENTHAM., *supra* note 14, at 6-7.

28. Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT’L. L. J. 387, 396-401 (2003).; MARKS., *supra* note 12, at 372-373.

law, separation of powers, independence of the judiciary etc.

Advocators of the substantive approach consider democracy to be a form of self-government i.e. a form of government allowing the people to influence all decisions directly affecting them. This requires a more comprehensive approach to democracy as other elements such as the role of civil society, feminist perspectives<sup>29</sup>, accountability mechanisms<sup>30</sup> and the democratic nature of international decision-making mechanisms<sup>31</sup> should be taken into account. Here democracy is considered to be “more” than just the sum of various elements. The meaning of democracy can only be fully grasped when democracy is placed in a broader context. The nexus between these various elements is considered to be essential to the concept. Both approaches are closely connected and cannot be strictly separated from each other.<sup>32</sup>

Research shows that the majority of legal scholars –for whatever reason- tends to favor a minimalistic approach. For instance Thomas Franck argues that the legitimacy of governments will be judged by the international community and this according to an international accepted democracy standard comprising of the right to self-determination, the right to free and fair elections and freedom of expression.<sup>33</sup> Reginald Ezetah limits the content of the “right to democracy” to the right to political participation including the right to free and fair elections.<sup>34</sup> Steven Weatley defines the right to democratic governance in function of the right to political participation including the right to free and fair elections, the right to freedom of association, and the right to

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29. Dianne Otto, *Challenging the “New World Order”: International Law, Global Democracy and the Possibilities for Women*, 3 TRANSNAT’L & CONTEMP. PROBS. 371 (1993).

30. BEUTZ., *supra* note 29, at 396.

31. James Crawford, *Democracy and the Body of International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory Fox & Brad Roth ed., 2000).

32. BEUTZ., *supra* note 29, at 396.

33. FRANCK, *supra* note 10, at 52.

34. EZETAH., *supra* note 10, at 514-523.

35. Steven Weatley, *Democracy and International Law: A European Perspective*, 51 INT’L & COMP. L. Q. 225, 235-246 (2002).

36. See for instance STEINER., *supra* note 10, at 96-116; FOX., *supra* note 10, at 540-542 ; Christina Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West*, 27 N.Y.U. J. INT’L. & POL. 289, 295 (1994-1995).

freedom of expression.<sup>35</sup> The same elements are withheld as core elements in definitions proclaimed by other authors.<sup>36</sup>

Conversely, within the practice of international organizations a holistic approach seems to be preferred. Within the context of the UN for instance democracy is defined as “*a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.*”<sup>37</sup> In addition the former UN Commission of Human Rights recognized “the comprehensive nature of democracy as a system of governance that encompasses procedures and substance, formal institutions and informal processes, majorities and minorities, mechanisms and mentalities, laws and their enforcement, government and civil society.”<sup>38</sup> It also reaffirmed “*that free and fair elections are an essential feature of democracy and must be part of a broader process that strengthens democratic principles, values, institutions, mechanisms and practices which underpin formal democratic structures and the rule of law.*”<sup>39</sup> A similar comprehensive approach is echoed within texts adopted by other international organizations.<sup>40</sup>

The difference in approach may be explained by the fact that scholars are looking for specific criteria to determine whether a nation is democratic or are examining whether a right to democracy can or does exist in international law. Such research requires a detailed and specific definition of democracy. States, however, merely want to express their commitment to democracy in general. The documents in which they do so are generally political in nature the goal of which is not to create on any concrete obligations (see below). It has been correctly argued in the literature that these texts could only have been adopted by consensus due to the fact that they are written in such a general

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37. G.A. Res. 62/7, U.N. Doc. A/RES/62/7 (Dec. 13, 2007).

38. Commission on Human Rights Res. 2003/36, U.N. Doc. E/CN.4/2003/L.36 (April 23, 2003).

39. Commission on Human Rights Res. 2001/41, U.N. Doc. E/CN.4/2001/41 (Mar. 21, 2001).

40. See for instance Bamako Declaration, Organisation Internationale de la Francophonie ¶ 2, Nov. 3, 2000; Organization of African Union, Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government ¶ 8, July 10-12, 2000, AHG/Decl. 5(XXXVI).

41. David Wippman, *Defending Democracy Through Foreign Intervention*, 19 Hous. J. INT'L L. 659 (1996-1997).



manner<sup>41</sup> and that the consensus would break down once one moves beyond the general discussions to the difficult issues of how democracy and human rights are to be interpreted and how they should be implemented or promoted.<sup>42</sup>

In conclusion, currently, there does not exist a universal consensus on one particular definition of democracy. However when looking at the vast array of definitions it becomes clear that one element appears to be present in all definitions, namely the respect for human rights. Minimalistic approaches tend to focus on specific rights whereas holistic approaches stress the indissoluble link between democracy and human rights. The existence of some sort of link does not appear to be controversial or questioned, however the exact nature of the link is unclear. The following section will take a closer look at the nature of the connection between democracy and human rights.

### III. THE NEXUS BETWEEN DEMOCRACY AND HUMAN RIGHTS

#### **International consensus on the existence of a link between human rights and democracy**

Without clarifying the concepts of democracy and human rights their interdependence has been recognized by many international and regional organizations *inter alia* the African

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42. Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship*, 36 GEO. J. INT'L. L. 809, 817 (2004-2005).

43. Lomé Declaration, *supra* note 41.

44. Organization of American States, Inter-American Democratic Charter arts. 2 & 3, Sept. 11, 2001, OAS Doc. OEA/SerP/AG/Res.1 (2001).

45. European Union, Cotonou Agreement art. 9, June 7, 2003, O.J. (L 141).

46. Organization for Security and Cooperation in Europe, Charter of Paris for a New Europe ¶ 3, Nov. 21, 1990, 30 I.L.M. 190 (1991).

47. Bamako Declaration, *supra* note 41.

48. The Commonwealth, Millbrook Commonwealth Action Program on the Harare Declaration ¶ 1, Nov. 12, 1995, (1997) COMMONWEALTH Y.B 51.

49. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Program of Action*, ¶ 8, U.N. Doc. A/CONF.157/23 (July 12, 1993); G.A. Res. 61/226, U.N. Doc. A/RES/61/226 (Mar. 14, 2007); G.A. Res. 60/253, U.N. Doc. A/RES/60/253 (May 24, 2006); G.A. Res. 58/13, U.N. Doc. A/RES/58/13 (Nov. 24, 2003); G.A. Res. 56/96, U.N. Doc. A/RES/56/96 (Jan. 30, 2002); G.A. Res. 55/43, U.N. Doc. A/RES/55/43 (Jan. 18, 2001); G.A. Res. 52/18, U.N. Doc. A/RES/52/18 (Mar. 2, 1998); Commission on Human Rights Res. 2002/46, U.N. Doc. E/CN.4/2002/46 (Jan. 23, 2002); Commission on Human Rights Res. 47, U.N. ESCOR, 62nd Sess., U.N. Doc.

Union<sup>43</sup>, the Organization of American States<sup>44</sup>, the European Union<sup>45</sup>, the Organization for Security and Cooperation in Europe<sup>46</sup>, the Organisation Internationale de la Francophonie<sup>47</sup>, the Commonwealth<sup>48</sup>, the United Nations<sup>49</sup>, the Inter-Parliamentary Union<sup>50</sup>, the Community of Democracies<sup>51</sup> and by various Arab<sup>52</sup> and Asian<sup>53</sup> states.

As practically all nations are represented in one of these institutions, it may be concluded that there is an international consensus on the existence of a link between human rights and democracy.

The significance and scope of the universal recognition of a link between democracy and human rights should be put into perspective. Firstly, the meaning and scope of both terms is and remains controversial. One may not derive from the above that an international consensus is emerging on the content or scope of these two terms.<sup>54</sup> In addition as the nature of that link is not specified it also cannot be derived that a consensus exists on the nature of that link.<sup>55</sup>

Secondly, the existence of the link is recognized mainly in policy documents generally conceived not to be legally binding upon the participating states. However, it has convincingly been argued that the qualification of a policy document does not necessarily mean that it does not contain any legally binding

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E/2000/47 (2000); Commission on Human Rights Res. 2003/36, U.N. Doc. E/CN.4/2003/L.36 (April 23, 2003); Commission on Human Rights Res. 2001/41, U.N. Doc. E/CN.4/2001/41 (Mar. 21, 2001).

50. Universal Declaration on Democracy, *supra* note 17, at ¶ 3.

51. Community of Democracies, Warsaw Declaration: Toward a Community of Democracies ¶ 3, June, 27, 2000, 39 I.L.M. 1306 (2000).

52. The Inter-Governmental Regional Conference on Democracy, Human Rights and the Role of the International Criminal Court, Sana's Declaration on Democracy, Human Rights and the Role of the International Criminal Court ¶ d, Jan 10-12, 2004.

53. World Conference on Human Rights, Bangkok, *Report of the Regional Meeting for Asia*, ¶ 10 & ¶17-20, U.N. Doc. A/CONF.157/ASRM/8-A/CONF.157/PC/59 (April 7, 1993).

54. PEERENBOOM., *supra* note 43, at 817.

55. PEERENBOOM., *supra* note 43, at 817.

56. Christian Berger, *OSCE and International Law*, 24 INT'L. J. LEGAL INFO 36, 38 (1996).

57. The constituent elements of a rule of customary international law are described in *North Sea Continental Shelf Cases* (Germany/Denmark and Germany/The Netherlands), 1969 I.C.J. Rep. 3, 4 ¶ 77 (Feb. 20).



norms as such documents may contain clauses stemming from international law, referring to international law or can be traced to international agreements by which the participating states are legally bound.<sup>56</sup> Rules contained in such documents can under certain conditions evolve to rules of customary international law.<sup>57</sup> The qualification as policy document does however influence the enforcement possibilities.<sup>58</sup> It is noteworthy that the few documents which are legally binding are regional in nature. This can be explained by the fact that a regional consensus exists or can easier be achieved on the content of human rights.

### **The nature of the nexus between human rights and democracy**

The references to the existence of a link between democracy and human rights can be divided into two groups. The first one considers respect for human rights to be a prerequisite for democracy, or the other way around. The second proclaims that democracy and human rights are interdependent and mutually reinforcing. The following section will examine the difference between these two approaches and its consequences and possible significance?

Respect for human rights is often perceived to be a prerequisite for democracy or vice versa namely that democracy constitutes a prerequisite for the respect of human rights. For instance the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (ICCPR), 1966, for instance, state *“the expression “in a democratic society” shall be interpreted as imposing a further restriction on the limitation clauses it qualifies. The burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition”*.<sup>59</sup> Other texts

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58. BERGER., *supra* note 57, at 42-43; Oscar Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AM. J. INT'L. L. 296, 300 (1977).; Thomas Buergenthal, *The CSCE Rights System*, 25 GEO. WASH. J. INT'L. & ECON. 333, 375-381 (1991-1992).

59. United Nations Economic and Security Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ¶¶ 19-21, Sept. 28, 1984, U.N. Doc. E/CN.4/1985/4.

60. See for instance G.A. Res. 2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000), at 1 and CERNA., *supra* note 37, at 295.

reverse the order and consider democracy to be a prerequisite for respecting human rights insinuating that in a democracy respect for human rights is best assured.<sup>60</sup>

Defining democracy in such a manner is incorrect and problematic as it suggests the existence of a causal connection between the two i.e. if a nation respects human rights it automatically may be considered to be a democracy and a democracy automatically respects human rights.

Respecting human rights does not automatically turn a nation into a democracy. Certain human rights can be adequately protected in non-democracies while others may be violated. For instance Ivory Coast organized elections which were declared free and fair by the international community but can hardly be called a democracy.<sup>61</sup>

Conversely, the above made insinuation that in a democracy respect for human rights is best assured is false. Empirical studies have illustrated that a democracy does not necessarily entail better protection of human rights.<sup>62</sup> Democracy may even exacerbate ethnic conflict and lead to greater violations of human rights especially in the period immediately following transition to a democratic system. Respect for human rights is only said to increase at the end of the democratization process i.e. when a democracy is well installed.<sup>63</sup>

In addition, longstanding democracies do not automatically provide the highest and best protection of human rights. For instance, in many democracies (e.g. Belgium and the United States) economic and social rights are not justiciable or only partly justiciable. Governments might provide a variety of welfare benefits including food and shelter, medical care and access to education. But citizens generally do not have the right to sue the government for such benefits in court.<sup>64</sup>

Moreover, the term democracy is often misused by nations

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61. NGO NEWS AND VIEWS, <http://www.ngopulse.org/category/defined-tags/governance-and-democracy/elections>

62. PEERENBOOM., *supra* note 43, at 864-865.

63. *Id.* at 864-865.

64. *Id.* at 843.

65. Akwasi Aidoo, *Africa: Democracy Without Human Rights?*, 15 HUM. RTS. Q. 703 (1993).

claiming to be a democracy but massively violating human rights for instance the Democratic Republic of the Congo or the Democratic People's Republic of Korea.<sup>65</sup> Thus "official" or "formal" democracies do not always adequately protect human rights.

The second and in my view more correct manner to identify the link between democracy and human rights is to describe both concepts as interdependent and mutually reinforcing.<sup>66</sup> Stressing the interdependence and mutual reinforcing character eliminates the causal connection between two concepts. "Interdependent" means that one cannot exist without the other. "Mutually reinforcing" means that both concepts directly or indirectly influence each other.

It is evident that a democracy cannot exist without human rights. It is also true that there is a greater likelihood that human rights are "better" respected. However, it is well recognized that democracy is "aspirational" to some extent as violations of human rights occur even in longstanding democracies.<sup>67</sup> Not all human rights violations undermine the democratic system. Other factors are important as well such as the "degree" of violation. Moreover, under specific circumstances, a government may limit the exercise of certain human rights.<sup>68</sup>

Both approaches do not resolve the following underlying issue. The phrase "respect for human rights" is a very vague as it is unclear what human rights are envisioned? Theoretically, all human rights are universal, indivisible and interdependent.<sup>69</sup> Thus, in order to be "democratic" all civil, political, economic, social and cultural rights would have to be respected. This would be problematic for the following reasons. First human rights

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66. See for instance Commission on Human Rights Res. 2003/36, U.N. Doc. E/CN.4/2003/L.36 (April 23, 2003).

67. "Absolute democracy (...) which no society embodies totally" FRANCK, *The Democratic Entitlement*, supra note 17, at 4; See also the Universal Declaration on Democracy, supra note 17 at ¶ 2 which refers to democracy as "a constantly perfected and perfectible state or condition whose progress will depend upon a variety of political, social, economic and cultural factors".

68. Karel Rimanque, *Noodzakelijkheid in een Democratische Samenleving - Een Begrenzing van Beperkingen aan Grondrechten*, in LIBER AMICORUM FREDERIC DUMON (Frédéric Dumon ed., 1983); Oscar Garibaldi, *On the Ideological Content of Human Rights Instruments: The Clause "In A Democratic Society"*, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN (Thomas Buergenthal ed., 1984).

69. Vienna Declaration and Program of Action, supra note 50, at ¶ 5.

appear to be an open-ended category of rights.<sup>70</sup> Secondly, all human rights treaties and texts contain a different set of rights. Moreover, not all nations accept all rights to be legally binding upon them<sup>71</sup> and different geographical regions tend to emphasize different human rights.<sup>72</sup> The interpretation and implementation may also vary according to the region.<sup>73</sup>

Secondly, the phrase does also not provide any clarity on the extent to which human rights must be respected or to what extent they may they be limited. In most human rights treaties certain human rights may be limited when “necessary in a democratic society”. This is a circular reasoning as on the one hand these texts recognize that a nation respecting human rights can be labeled democratic; on the other hand it is acknowledged that human rights may be limited in the event that they are democratic.

Conceptually democracy is linked to human rights. As many issues remain unsolved with regard to human rights, these issues reflect on the discussion of democracy. As such no true progress can ever be made with regard to democracy if no progress is made with regard to these outstanding human rights issues.

#### IV. CONCLUSION

This article examined the link between democracy and human rights in international law. The importance of the research lies in the fact that democracy’s importance in international law is increasing rapidly, however no clarity appears to exist on its scope and content. Currently in international law there is no universal consensus on one particular definition of democracy. Regardless, there does appear to exist an international consensus on the existence of an indissoluble link between human rights and democracy. The exact nature of that link is unclear. As a closer look at the nature of that link can provide deeper insights into the

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70. The UN General Assembly recognized very recently the right to water and sanitation as a human right. G.A. Res. 62/292, U.N. Doc. A/RES/62/292 (July 28, 2010).

71. The status of ratifications of the various human rights treaties can be consulted at UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited on Jan. 16, 2011).

72. See for instance China’s comments after the recorded vote on the *Draft Resolution on the Promotion of the Right to Democracy*, U.N. ESCOR, 53rd Sess., 57th mtg. U.N. Doc. E/CN.4/1999/SR.57 (April 30, 1999). See also GHAI, *supra* note 13.

73. PEERENBOOM, *supra* note 43, at 868.

meaning of democracy it was the purpose of this article to explore the nature of the nexus between human rights and democracy.

Part one examined how democracy is defined in international law and what methods can be used when doing so. Research has shown that there are several manners which may be used to define democracy and that all of them have certain flaws. International law favors the method of defining democracy in function of its underlying elements. Currently no consensus exists on one particular definition. Consequently many different circumscriptions of the term exist in international law. When looking at the vast array of these definitions it becomes clear that respect for human rights is present in all of these definitions.

Section two of the paper then examined how respect for human rights relates to democracy. It has become clear that in international law two approaches exist: one accepts the existence of a causal link between the two terms, while the other considers both concepts to be interdependent and mutually enforcing. Research has shown that accepting the existence of a causal link between democracy and human rights is problematic for various reasons. Therefore the second approach was considered to be the better one. However, both approaches do not resolve standing issues with regard to the meaning of human rights. Due to the remaining obscurity surrounding the concept of human rights it would prove quasi impossible to define a universal acceptable "human rights standard" to determine whether a nation is democratic or not. Given that democracy's fate is attached to that of human rights, no true progress can be made on the issue of democracy as long as no international consensus can be found on the exact content on human rights.

# INTERNATIONAL LAW AND ITS RELATIONSHIP WITH MUNICIPAL LAW

Rakesh Gosain\*

## I. INTRODUCTION

International law has the relationship between States as its primary focus,<sup>1</sup> while municipal law is concerned with the domestic aspects of governance, with issues between individuals and issues between the individual and the administrative setup. There are various theories that govern the relationship of international and municipal law, ranging from monism, dualism, transformation, delegation and harmonization.

International law supersedes municipal law in the sense that non compliance to an international obligation cannot be brushed off by a State claiming that the action was in pursuit of its own municipal laws. The State cannot use any provision within its internal legal structure to evade an international obligation.

Treaties, executive certificates, and other principles of customary law provide a means for application of international law. Different countries however follow different methods in the approach and application of international law to municipal jurisdiction.

## II. INTERNATIONAL LAW AND MUNICIPAL LAW: THE INTERFACE

It is the nature of man to live in communities. He lives in this fashion in every part of the world today, and the evidence of history and pre-history shows how long he has been doing so. But then it must be noted that where people live together, conflict is bound to arise due to various conflicting interests among the people. Also, bearing in mind that everybody tries to work hard, obtains basic needs and all other things which help to make life happy and comfortable which are incidentally in short supply, since the supply is always in short in proportion to the demand, competition for them sets in. It is a race in which we all engage. And in every race or game there must be rules and regulations, else, we are moving towards the 'state of nature' as enunciated by Hobbes. Therefore, the existence of rules and regulations (in particular, law) becomes a *sine qua non* to the peaceful co-existence of people and nations all over the world.

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There have been various definitions of law by different scholars across the global intellectual community. These definitions exist, ranging from the philosophical to the practical. Plato called law as social control; William Blackstone (1977) sees law as rule thereby specifying what was right and what was wrong. For the purpose of this study, law is viewed as a body of rules that establish a certain level of social conduct, or duties that members of the society honour.

Law simply means an arrangement that coordinates and confines people's behaviours to conform to an agreed general way of human conduct in a given society, with a threat of sanction against defiant behaviours. Inferred from the above definitions is the need to obey the law. This is because disobedience may attract sanctions that may result in imprisonment, fine or death, depending on the nature of offence. Law may also be defined as a body of rules or regulations governing the conduct of human beings in their social regulations.

The inherent nature of human beings is their unpredictability in terms of behavioural conduct. States, groups and international organisations, like individuals who constitute membership of these social formations, suffer from this innate problem. Therefore, for law to really serve its purposes, a competent and constituted body that has recognised authority must make such law. Further, it must be dynamic because society in which it operates is dynamic and ever-evolving. Law should also be consensual. International law is one of consensus rather than one of force. Even in the national society, laws are only laws when one consents to it. It might be out of fear of reprisal or coercion. Law regulates conduct, maintains peace, and provides protection and means of achieving justice.

Specifically, law serves as a tool of order, and as a tool order it promotes order within the national and international society. There is no denying the fact that a comprehensive set of rules, regulations, obligations, rights, legal doctrines and decisions of national and international tribunals on legal matters does help to promote international order. Law regulates the behaviour of the citizenry. Without law, society would have been disorganised and become ungovernable.

### **III. THE CONCEPT OF MUNICIPAL LAW**

Municipal law is the internal law of the State which is binding on the citizens of that particular State. It is defined as the domestic law of a State regulating the conduct of individuals and legal entities within it. Shaw sees municipal law as law that governs the domestic aspects of government and deals with issues between individuals and the



administrative apparatus.<sup>2</sup>

#### IV. THE CONCEPT OF INTERNATIONAL LAW

It is an indisputable fact that international law is a victim of definitional pluralism. This is because many scholarly definitions have been given to it by various scholars of repute from different perspectives. Some of these definitions will be explored for the purpose of this study.

Khan defines it as a 'body of rules, laws, and norms, which serves to limit the sovereignty of state in the international society'. Oppenheim sees it as the 'body of customary and treaty rules which are considered legally binding by States, in their intercourse with each other'. Jessup presents it as the body of laws, which is applicable to States in their relations and to individuals in their relations to other States. In the same vein, Kolawole defines international law or what he calls the 'law of nations' as the body of rules and principles of action which are binding upon civilized States in their relations with one another. International law is the law at the international level made by the collective will of States and to lesser degree organisation and individuals.<sup>3</sup> In essence, international law is a body of generally accepted principles and rules regulating or controlling the conduct of States, individuals and international organisations for the purpose of peaceful coexistence in the international plane.

Another scholar has identified the functions of international law, which include minimising frictions between and among States, stabilizing the behaviour of States, facilitating cooperation between and among States, protecting individuals, settling disputes and serving as a tool of public relations and propaganda.<sup>4</sup>

International law also serves as an instrument of national policy. It contributes to a nation's means of attaining its objectives in foreign policy. It also serves as an integrative force in the world community, since no State can live in isolation. It atomised the entire States and people of the world into one whole as they are all subjects of the law without prejudice to race, colour or class.

2 MALCOLM N. SHAW, INTERNATIONAL LAW 130 (6<sup>th</sup> ed. 2010)

3 MALCOLM N. SHAW, INTERNATIONAL LAW 105 (4<sup>th</sup> ed. 1997)

4 TUNDE ADENIRAN, INTRODUCTION TO INTERNATIONAL RELATIONS (1983)



## **V. DIMENSIONS OF INTERNATIONAL LAW**

The scope of international law can be categorised into six broad topics, namely:

1. The law of peace, which seeks the peaceful settlement of international disputes.
2. The law of war; since conflict is an inevitable outcome of human and State relations. Conduct of hostilities must conform with laid-down regulations in terms of types of military wares and ammunition to be used, and stages of their utilisation, targets and non targets of attack, areas of combat, treatment of civilians, journalists and prisoners of war and refugees, and the duties of humanitarian agencies such as the Red-Cross.
3. The law of neutrality; international law forbids aggression on neutral States in war. It also spells out reciprocal responsibilities for neutral States. Law forbids them to render any form of assistance whatever military or civil to any of the parties engaged in hostility.
4. Mercantile laws, which relate to regulations on international trade, foreign investment and multilateral trade agreements between States.
5. The law of sea. The sea is very vital to the world economy as it provides varied marine food and mineral resources. It serves as a means of international transportation, and it serves as strategic resource for national defence. For these reasons, nations have fought wars over marine resources. Consequently, activities of States in the sea need to be regulated in order to present inter-State disputes.
6. Convention on the use of outer space. The law regulates the exploration and launching of objects into outer space.

## **VI. COMPARING INTERNATIONAL LAW AND MUNICIPAL LAW**

The relationship between international law and municipal law is full of theoretical problems. The international legal literature on the subject records two main principal theories involved in the debate. But it is to be noted that this part does not necessarily distinguish or differentiate international law from municipal law or give one primacy over the other, but rather, it justifies the existence of both laws as laws in the

real sense of it. Nevertheless, some of the arguments put forward by different schools of thought to explain the relationship between the two laws will be explored for theoretical explanation and academic consumption.

The dualist or pluralist school of thought assumes that international law and municipal law are two separate legal systems, which exist independently of each other (Malanczuk, 1997, 63-71).<sup>5</sup> Dualism stresses that the rules of international and municipal laws exist separately and cannot purport to have effect on, or overrule the other. This according to the school is because of the fundamentally different legal structure employed on one hand by the State, and on the other hand as between States.<sup>6</sup>

The dualist position is accepted by the positivists like Triepel and Anzilloti. Triepel maintains that international law must be incorporated into the municipal law because the subject of a State is the individual whereas the subject of international law is an abstract entity known as the State. Since subjects are not the same, there has to be a transformation from one to the other, i.e. international law has to be transformed into the State law before it can be applied to individuals. This process is incorporated in the "transformation theory". The claim of Triepel as regards State as the only subject of international law can no longer be sacrosanct due to dynamism in law. In the contemporary international law, individuals are seen as subject albeit a limited capacity.

The 1945 Nuremberg Trials made individual as the subject of international law. Further, the Angola Trial also enunciated the same phenomena. Anzilloti talked of the conditioning of the two laws. In his opinionated view, State laws are imperativel and hence it has to be obeyed, whereas international law is in the nature of promises. It is therefore necessary to transform a promise into command before it becomes applicable in the municipal law. The position also is not sacrosanct, in the sense that law is not necessarily command; people obey the law when they consent to it and often people obey because of the possible gains that can be acquired.

The second school of thought known as Monism, has a unitary perception of the law and understands both international law and municipal law as forming part of one and the same legal order. The

5 AKEHURST, S MODERN INTRODUCTION TO INTERNATIONAL LAW, PETER MALANCZUK 63 - 71 (Routledge 1997) (1970)

6 *Id.*

most radical version of the Monist approach was formulated by Kelsen. In his view, 'the ultimate source of validity of all law', is derived from a basic rule of international law.

Kelsen's theory implies that all rules of international law were supreme over municipal law, that a municipal law inconsistent with international law was automatically null and void and that rules of international law were directly applicable in the domestic spheres of state. Kelsen's view was on formalistic logical grounds. They opposed strict division of the two laws as demonstrated by the dualists and accept the unitary view of law as a whole. Kelsen utilises the philosophy of Kant as its basis.

Law is regarded as constituting an order which lays down patterns of behaviour that ought to be followed, coupled with the provision for sanctions, which are employed once an illegal act or course of conduct has occurred or been embarked upon. Since the same definition implies both within internal sphere and international sphere, a logical unity is forged. Since States own their legal relationship to the roles of international law, and since States cannot be equal before the law without a rule to that effect, it follows that international law is superior to or more basic than municipal law.

Kelsen emphasises the unity of the entire legal order upon the basis of the predominance of international law by declaring that it is the basic norm of the international legal order, which is the ultimate reason of validity of the national legal orders too (Kelsen, 1997).<sup>7</sup>

Lauterpacht in his contribution upholds a strong ethical position with deep concern for human right. He sees the primary function of law as concerned with the well-being of individuals and advocates the supremacy of international law as the best method of attaining this.

Interestingly, Article 27 of the Vienna Convention on the law of treaties States that: "a party may not invoke the provisions of its internal laws as justification for its failure to carry out an international agreement." However, expression on the supremacy on the international law over municipal law in international tribunals does not mean that the provisions of domestic legislation are either irrelevant or necessary. On the contrary, the role of international legal rules is vital to the working of the international legal machine.

One of the ways that is possible to understand and discover a State's

7 JOCHEN VON BERNSTORFF AND THOMAS DUNLAP, THE PUBLIC INTERNATIONAL LAW THEORY OF HANS KELSEN ( Cambridge 2010)

legal position on a variety of topics important to international law is by examining its municipal laws. A country will express its opinion on such vital international matter at the extent of its territorial sea or the justification of the claims or the conditions for the acquisition of nationality through the medium of its domestic law making. Thus, it is quite often that in the course of deciding a case before it, an international court will feel the necessity to make a study of relevant pieces of municipal legislation. The rules of municipal law can be utilised as evidences of compliance or non-compliance with international obligations.<sup>8</sup>

## VII. INTERNATIONAL LAW VS. MUNICIPAL LAW?

International law governs the relation of sovereign independent States inter and constitutes a legal system the rules of which it is incumbent upon all States to observe. Municipal law also known as state law or national law is the law of state or a country.

International law regulates the behaviour of States whereas national law the behaviour of individuals. International law concerns with the external relations of the States and its foreign affairs. Municipal law concerns with the internal relations of States o and its domestic affairs.

International law is a law between equal sovereign States in which no one is supreme to the other but municipal laws the w law of the sovereign over the individuals subject to the sovereign rule.

Whether international law is a law or not is a debatable question and this debate is continued where as municipal law is a law in a real sense and there is o doubt about it.

However, international law and municipal law relates to each other and justice considers that both form a unity being a manifestation of a single conception of law while others say that international law constitutes an independent system of law essentially different from the municipal Law. Thus, there are two theories knows as monastic and dualistic. According to monism, the origin and sources of these two laws are the same, both spheres of law simultaneously regulate the conduct of individuals and the two systems are in their essence groups of commands which bind the subjects of the law independently of their will. According to dualism, international law and municipal law are separate and self contained to the extent to which rules of one

8     *Supra*, n. 3

are not expressly tacitly received into the other system. The two are separate bodies of legal norms emerging in part from different sources comprising different difference subjects and having application to different objects.

## VIII. COMPLEMENTARY NATURE OF INTERNATIONAL LAW AND MUNICIPAL LAW

International law does not entirely ignore municipal law. For example, municipal law may be used as evidence of international custom or of general principles of law, which are both sources of international law. Moreover, international law leaves certain questions to be decided by the municipal law.

Harmonisation theory succinctly provides an answer to the true relationship of the two laws by asserting that:

“The starting point in the legal order is that man lives not in one jurisdiction, but in both. International law and municipal law are concordant bodies of doctrine, autonomous but harmonious in their aim of basic human good. When faced with an actual problem, a municipal court applies the rules operative within its jurisdiction and may in fact, apply international law to the exclusion of municipal law, or vice-versa.”

A treaty or other rule of international law imposes an obligation on States to enact a particular rule as part of their own municipal law. Similarly, there is a general duty for States to bring domestic law into conformity with obligation under international law either through transformation, incorporation, adoption or reception, e.g. treaties ratified in accordance with the constitution automatically become part of the municipal law of the USA. In Britain, the traditional rule is that customary international law automatically forms part of English law.

In a case before a municipal court, a rule of international law may be brought forward as a defence to a charge. For example, a vessel may be prosecuted for being in what the domestic terms is regarded as territorial waters, but in international law, it would be treated as part of the high seas.

Okeke (1986:6) puts it in the following manner:

*“...as States grow in their international outlook, and as they participate in either the creation of new rules of international law or in the re-definition of the already existing ones, it must be borne in mind that the world is now advancing on the principle of interdependence and mutual cooperation. The*

*age of holding tenaciously to the principle of absolute sovereignty is far gone. Indeed, a state by taking laws to be in conformity with international law is a legitimate exercise of the sovereignty of such a state.”<sup>9</sup>*

Okeke’s position stresses the dynamism in law and the society. When the law operates and the need for global intercourse of nation for global benefits; and such interaction must be regulated with law both at national and international levels so as to have a peaceful and ordered world.

Okeke in his analysis cited a section each from the Constitutions of Germany and the United States of America to affirm the interconnectedness of international and municipal laws. The Constitution of the Federal Republic of Germany provides:

*“The general rules of public international law are an integral part of the federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.”<sup>10</sup>*

In the same manner, the American Constitution also provides:

*“The constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be the supreme law of the land, and the judges in every state shall be bound thereby, and everything in the constitution or laws of any state to the contrary notwithstanding”.<sup>11</sup>*

In addition, the rule of the municipal law can be utilised as evidences of compliance or non-compliance with international obligations, e.g. the issue of respect of fundamental human rights. Though, in some countries the law will sometimes fail to reflect the correct rule of international law, but this does not necessarily mean that States will be breaking international law.

## IX. CONCLUSION

From the submissions above, ranging from definitions of law, characteristics and purposes to relationship and complimentary nature of municipal law and international law, it is clear that both laws possess the qualities of law and all that takes to be called laws. They serve the same purposes and perform functions of law because they are

9 C. NWACHUKWU OKEKE, THE THEORY AND PRACTICE OF INTERNATIONAL LAW (Fourth Dimension 1986)

10 *Id.*

11 U.S. CONST. Art, VI

meant to regulate conduct, maintain peace, provide protection, achieve justice, etc. They are both enforceable; they have different mechanisms of enforcement and agencies. They are both dynamic in nature, they are made by competent and recognised authority, etc. As a matter of fact, both laws have been able to work towards achieving well ordered societies, which is the ultimate goal of any law. Therefore, international law and municipal laws are real laws.

# THE UNITED NATIONS AND THE RULE OF LAW: THE ACTION OF THE SECURITY COUNCIL

Cecilia Zorzoli\*

## I. DEFINING THE RULE OF LAW.

To define what the term “rule of law” means is a very challenging issue. As a matter of fact, even if it is quoted in many fundamental international documents as an essential element for a peaceful global context, there is no shared definition regarding its content and its limits. Its primary role is enshrined and sacred in the Preamble of the Universal Declaration of Human Rights of 1948, which states that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”<sup>1</sup>. On the other hand, such a wide agreement on the importance of the rule of law may be due to the vagueness of its content. However it unanimously comprises at least these three elements: government of laws, the supremacy of the law, and equality before the law.

*Government of laws* means that the State must not use its power in total discretion. That is to say, no rule of man is tolerable. In any case this principle isn’t extended till requiring a particular purpose in the State action: it comprises only the accessibility and clarity of laws. The *supremacy of the law* means that the laws have to be applied to everybody, even the sovereign, by an independent institution like the judiciary. This is very different from the so-called rule by law, by which the sovereign can legally act with absolute powers. In the end, *equality before the law* means that laws have to be applied equally to everybody, without discriminations. Law must be applied generally and be able to play its role not only as “law in books”, but also as “law in action”.

### I.I ORIGINS OF THE RULE OF LAW: DIFFERENT TRADITIONS.

The concept of rule of law derives from different traditions: it firstly rooted in the Anglo-American tradition in a theoretical perspective rather than in practical application. As a matter of

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1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).



fact Magna Charta Libertatum already in 1215 put the first limits to the power of the king, but such limits were seriously respected only from the XVII century<sup>2</sup>.

The fundamental Bill of Rights Act was adopted in 1689, after the civil war (1642-1660) and the beheading of King Charles I Stuart happened, a fact that put an end to the absolute sovereign of the king in England for good. Bill of Rights Act defined “illegal” the power of the king to suspend<sup>3</sup> or dispense<sup>4</sup> with laws, to establish his own courts<sup>5</sup> and to impose taxes without the approval of the Parliament<sup>6</sup>. Such Act moreover established that the members of Parliament should be free and that parliamentary proceedings should be subject only to parliamentary scrutiny. In spite of these provisions, however, the king was still powerful while the institutions supporting the rule of law weak.

As regards the development of rule of law in continental Europe, things are different. More importance is given to the nature of the State rather than to the judicial phase, as a matter of fact “rule of law” can be translated as “*stato di diritto*”, “*Rechtsstaat*”, “*État de droit*”, “*estado de derecho*”.

In the German tradition, the origins of the *Rechtsstaat* are based in Kant’s philosophy, in Robert von Mohl<sup>7</sup> book *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*<sup>8</sup> (which mean, police science according to the constitutional principles) and in Hans Kelsen’s theories<sup>9</sup>. There is an ongoing debate whether the concept of “*Rechtsstaat*” involves both substantive

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2. In 1607 Lord Chief Justice of the Common Pleas, Sir Edward Coke, rejected the King’s (James I) argument that he had the power to decide himself cases, without basing on the judiciary. Sir. Coke declared that even if the King is not subject to man, he is subject to God and the law, as already stated in “*Prohibitions del Roy*” of 1343.

3. Bill of Rights Act, 1689, c.1.

4. *Id.* c.2.

5. *Id.* c.3.

6. *Id.* c.4.

7. Robert von Mohl (1799-1875), jurist, professor of political science, member of the parliament of Württemberg and of German Parliament, minister of justice for a few months. He coined the term “*Rechtsstaat*” as opposed to aristocratic police state.

8. ROBERT VON MOHL, *DIE POLIZEI-WISSENSCHAFT NACH DEN GRUNDSÄTZEN DES RECHTSSTAATES* 1834.

9. Hans Kelsen (1881-1973), a Jewish Austrian-American jurist. In his positivistic perspective, rule of law and State were synonymous.

and formal aspects. A substantive aspect is the use of reason in creating the laws, while a pure formal requirement is legality, with the paradoxical case of National Socialism.

In the French tradition an essential role is played by Montesquieu's "*De l'esprit des lois*"<sup>10</sup> of 1748 and Rousseau's "*Du contrat social*"<sup>11</sup> of 1762. The main legal text was the French Declaration of the Rights of Man and of the Citizen of 1789, but it was applied for the first time only in 1971 to invalid a French law<sup>12</sup>.

In the Arabic tradition the first relevant document is the Code of Hammurabi (created around 1790 BC in ancient Babylon), that adopted a concept of supremacy of law far earlier than the Europeans. But this happened just in theory, since practice was different. Nowadays, in modern Arabic there is no equivalent word for the term "rule of law"<sup>13</sup>.

## I.II. PROMOTING THE RULE OF LAW.

After this brief overview, it is clear that the meaning of the term rule of law is linked both to time and geography. The main difference lies between formal and substantive understandings. Formal perspectives considering rule of law as a limitation on the power of the State, are the positivist or the so-called thin theories, while substantive theories involve a "thick" range of principles, like justice, human rights, specific forms of government, free market capitalism. Such perspectives are often interwoven. Maybe a formal definition, being more strictly related to law, is more appropriate to present situations and purposes: it can be commonly shared in different social and political contexts.

The main issue related to the rule of law is its promotion. It has been promoted through treaties and international organizations. Human rights treaties promoted rule of law as essential basis for economic growth and recently the UN Security Council considered it also as an important step towards resolution

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10. It advocated constitutionalism, separation of powers and basic civil liberties. The book was published anonymously.

11. It stated the supremacy of law, but considering legislation as the expression of popular will, that is to say without any limitation.

12. Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44 DC, July 16, 1971 (Fr.).

13. A valid approximation may be "*siyadat al-qanun*", that literally means sovereignty of law.

of conflicts. Rule of law plays a role in promoting human rights, development, peace and security.

As regards human rights, the three principles mirrored in the concept of rule of law are enshrined in the Universal Declaration of Human Rights. As a matter of fact, arbitrary privation of liberty is prohibited. Fair trials by independent tribunals and equality before the law are required. Such document lays at the basis of every other document regarding human rights.

So far as the relationship between rule of law and development goes, the rule of law played the role of a vehicle for promoting economic development<sup>14</sup>. The United Nations Development Programme (UNDP) in its report of 1992 "Human Development" listed some criteria to verify the level of the rooting of the rule of law, such as fair and public hearings, an independent and impartial judiciary, the possibility to obtain legal counselling, the possibility of review in criminal cases, the possibility to prosecute even government officials if violating the rights of other people.

The last step in the relationship between rule of law and development is the acceptance of developing countries of the 2005 World Summit Outcome, which states that "good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger"<sup>15</sup>.

The rule of law, as said before, has been used also as a mean to maintain peace and security. The UN Charter confers to the Security Council the power to act under Chapter VII in order

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14. An example of the consideration it had can be the "law and development" movement, born in the US in the 1960s. With this programme the United States Agency for International Development, the Ford Foundation and other private donors wanted to reform the laws and judicial institutions of developing countries in Africa, Asia, and Latin America. This movement produced many reports and articles but in the end failed in reaching its aim, since it was too focused on the exportation of US legal system, often incompatible with the legal systems of the target countries. By the way, such processes of reform require many years to succeed and should not be influenced by the US national issues (that in the years 1965-1975 were extremely relevant). Nowadays efforts are less devoted to the exportation of a model and more focused on target countries.

15. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16. 2005).

16. Like those in Guatemala, in Liberia, in Côte d'Ivoire and in Haiti.

to maintain global peace and since the mid-1990s its powers expanded supporting or replacing domestic legal systems. Many UN missions had important rule of law components<sup>16</sup>, with wide mandates that urge for reestablishment or restoration and maintenance of the rule of law, without furnishing any further indication. In concrete, such activities were essentially training of personnel, assistance in the institution-building process, taking part in the law reform issues, monitoring, focusing especially on criminal law issues. In two missions (Kosovo and Timor-Leste) the UN directly ruled the administration of Justice, controlled police and prisons. Even in Bosnia-Herzegovina through the Office of the High Representative the UN did the same.

Moreover the UN action to support the rule of law lead to the creation of tribunals, like the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and the creation of hybrid tribunals such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. A fundamental role is played by the International Criminal Court, which exercises a complementary jurisdiction, so as to encourage national trials and protecting the sovereignty of the State<sup>17</sup>.

### **I.III. RULE OF LAW AND INTERNATIONAL ORGANIZATIONS.**

Dealing more in particular as to how the International Organizations operate to support and promote the rule of law, it seems difficult to draw a picture on how such concept influenced international affairs. This situation may be due to the fact that the concept of rule of law has developed within a vertical national context that is say, in citizen-sovereign scheme of relationship, while on the international level the sovereignty is horizontal among equal States.

In particular, the United Nations<sup>18</sup> actively worked for

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17. Even if the Council has the power to defer prosecution, as stated in Rome Statute of the International Criminal Court, art. 16, July1, 2002, 2187 U.N.T.S. 90. This situation mirrors the difficulties in according two international interests: the promotion of justice and the maintenance of peace.

18. Whose legal personality was established by the International Court of Justice with the Advisory Opinion "Reparation for Injuries Suffered in the Service of the United", (1949) ICJ Rep 173, considering it as implicit in the decision of fifty States to create the Organization.

promoting rule of law, acting in a framework of legal mechanisms. The UN can both apply its power with discretion within the limits of the Charter and arbitrary. As a matter of fact, the Security Council, which was created as a political organ, has the power to decide to establish a mission to face a particular crisis, but from 1999 it started to apply targeted sanctions. Such sanctions were meant to punish terrorists by cutting their funds, but were strongly criticized for the lack in transparency in identifying the subjects involved and for the lack of any formal review<sup>19</sup>.

Moreover there are many other unresolved problems, like the

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19. As Silvio Favari underlines in *Sovranità, diritti umani e uso della forza: l'intervento armato "umanitario"*, Pubblicazioni Centro Studi per la Pace, 2002. Available at [www.studiperlapace.it](http://www.studiperlapace.it) (last visit march 2010).

He quotes the problematic Haiti case of 1994: the UN intervention was decided on the basis of Chapter VII of UN Charter. But such intervention was not justified on the basis of a violation of human rights, since it was directed to maintain the government democratically elected. Such intervention was a symbol of the growing interest of the UN within national affairs of a Country, but it was decided in order to fulfil the most important UN aim: maintenance of international peace and security.

20. A particular situation regards the relationship between the European Union and the European Convention of Human Rights and Fundamental Freedoms: the Court of Justice of the European Union in its advisory opinion n.2/94 of 28 march 1996 denied the legal basis for the EU for joining the ECHR, since the EU didn't have jurisdiction in the field of human rights: there was no norm in the EU Treaty conferring European institution the power of creating norms or signing treaties of human rights. But with Lisbon Treaty the situation was reversed. The new article 6/2 of EU Treaty establishes the accession of the European Union to the European Convention of Human Rights and ensures that such accession shall not affect the competences of the Union or the powers of its institutions. Fundamental rights, as guaranteed in the Convention and as resulting from common Constitutional traditions of Member States, are part of European Union law as general principles. The accession is regulated with a series of procedures and will request a long time. The European Court of Justice applies and interprets the ECHR in the disputes of its competence. The present situation, in which the Convention is applicable only to the States and not to the EU itself, is paradoxical. Moreover, the jurisprudence of the ECHR established that Member States are responsible for the respect of the Convention in the application of European Law. So that a theoretical conflict between UE and ECHR is possible. But coherence of the system is ensured by the Court of Justice of the EU, that refers constantly in its activity to the jurisprudence of the ECHR while applying and interpreting the Convention. Moreover, in the *Bosphorus vs. Ireland* case, (Appl. No. 45036/98, Judgment of 30 May 2005) the European Court of Human Rights reaffirmed that the UE offers a presumption of "equivalent guarantee" of human rights, so that a Member States respects the Convention while complying the obligations deriving from European Law.

issue of applying the law to the UN itself, since the Organization is not part of human rights treaties, even if they were born under its auspices or monitored by its agencies. This situation depends on the traditional view that only States can enter such kind of treaties, since States alone can violate or promote human rights<sup>20</sup>. But things are different since the UN carries out the functions of a State, for instance by ruling administrations or territories. A series of cases arose regarding targeted financial sanctions and in the end the European Court of First Instance<sup>21</sup> stated that the UN has to comply only with norms of *jus cogens*, due to the UN Charter's primacy clause enshrined in Art.103 of the UN Charter. Other thorny questions are that the UN doesn't have any formal procedure for monitoring its organs and that the organs can interpret the Charter by themselves, since the International Court of Justice has not the functions of a Constitutional Court<sup>22</sup>. The issue was at the centre of important decisions, crystallizing the contrast between the Council and the Court, such as in the "*Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*" (*Libyan Arab Jamahiriya v United Kingdom*) (*Provisional Measures*)<sup>23</sup> and the "*Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*" (*Libyan Arab Jamahiriya v United States of America*)

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21. For instance the European Court of First Instance has considered actions aiming at the annulment of European measures adopted in relation United Nations Security Council counter-terrorism measures. Council Regulation 2002/881, 2002 O.J. (L 139) 9 (EC) applying sanctions of the S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct.15, 1999).directly linked to the list of the UN Sanctions Committee has only been subjected to limited review.

The *Yusuf, Kadi, Ayadi* and *Hassan* cases regard such Community Regulation No. 881/2002. They were people resident respectively in Sweden, Ireland, Great Britain and Saudi Arabia, and were all listed in the Annex and sought its annulment on the grounds, that it infringed their fundamental rights. (CFI, *Yusuf and Al Barakaat International Foundation v Council of the European Union and the Commission of the European Communities*, Case T-306/01; *Kadi v Council of the European Union and the Commission of the European Communities*, Case T-315/01; *Ayadi v Council of the European Union*, Case T-253/02; *Hassan v Council of the European Union and Commission of the European Communities*, Case T-49/04, available at <http://curia.europa.eu>, last visit march 2010).

In such cases the Court declared it could review a European regulation taken complying a Council's decision only referring to the *jus cogens* parameters, since there is no other parameter for a valid international review.

22. By the way, an organ can require an advisory opinion.

23. ICJ Rep 3, 1992.

24. ICJ Rep 114, 1992.



*(Provisional Measures)*<sup>24</sup> .

Another interesting issue related to the relationship between the rule of law and the UN is that such concept comprises the idea of equality before the law, while in the UN system some members are “more equal than others”: the Security Council has five permanent members with a strong privilege, the veto power<sup>25</sup>.

#### **I.IV. THE RULE OF LAW AT INTERNATIONAL LEVEL.**

There are three meanings of rule of law at international level.

In the first perspective, it can be meant as a simple application of the principles of rule law to the relations among States and the other actors of the international scenario. This meaning is the one which is widely prevalent at the moment.

In a different perspective it can express the superiority of international law on domestic law, ensuring for instance the priority of human rights treaties on national legal production. In this sense, the activity of certain regional organizations, such as the European Union, can be an effective example. However such organizations are almost exceptions in the international context and by creating a State-like structure they recall a concept of rule of law more related to the meaning of rule of law at a national level.

In the end, rule of law at international level may be understood also as a normative regime able to regulate individuals without the mediation of national institutions. This is the situation of the quasi-administrative regimes that don't correspond to any national or international legal category and are just beginning developing. By now justice seems more reachable through organizations of States rather than by a global law. In spite of this, the UN Charter

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25. This problem was faced in relation to the quasi-legislative resolutions of the Security Council dealing with counter-terrorism and proliferation of weapons of mass destruction.

26. For instance Paragraph 3 of the Preamble simply expresses determination “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. As regards peaceful resolution of disputes, the Charter simply states in its Art.1 that they must be resolved “in conformity with the principles of justice and international law”, without mentioning the need for the elimination of breaches of peace and prevention or removal of threats.

has been described also as a sort of a global Constitution. But its language is more hortatory than declaratory when dealing with international law issues<sup>26</sup>.

Moreover the UN, according to Art. 13 of the Charter, has the task to promote the development and codification of international law. All these points show that international law as a legal system is still primitive, very different from domestic law. Moreover all judicial organs at international level are basically possessing voluntary jurisdiction; so the summations can be made that the international rule of law doesn't exist. The solution can be different by interpreting rule of law as the whole range of debates about international law, since it is evident that the principles of the national legislation can't be directly transferred in the international law: there are structural differences between the two levels (horizontal and vertical structures), very different historical and political contexts. The concept of international rule of law may be built with the same elements that compose domestic rule of law. In that perspective, government of laws, that means non-arbitrariness in the exercise of power, is expressed in the formula "*pacta sunt servanda*" and in the attempts of creating international protections for human rights and standards for international trade. An effective way for strengthening this point may be expanding codification of international law<sup>27</sup>: as a matter of fact the main features of the rule of law, like clarity, are weakened by the fragmentation of law due to different legal traditions and categories. The second idea of rule of law is supremacy of law, that is to say the distinguishing between rule of law and rule by law. On international level such distinction is less applicable, since among States there is no hierarchical relationship. Improving rule of law in this direction would mean expanding the acceptance of the jurisdiction of the International Court of Justice and of other independent courts and would mean also the necessity of the application of international law also to international organizations. The third element of rule of law, equality before the law, is strictly linked to the question of who is subject of law. In domestic law, States treat juridical persons differently from natural persons; improving international rule of law in this direction would mean applying international law to States and other entities, eliminating anomalies such as the veto power in the UN Security Council.

On these bases, rule of law is pictured as a political challenge,

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27. U.N. Charter Art. 13.



still far from being a normative reality. The UN is working to change such perspective, applying rule of law in its activities to promote human rights, peace and development.

#### **I.V. RULE OF LAW & THE UNITED NATIONS: AGE OLD BED FELLOWS**

The choice of analyzing in particular the practice of the United Nations reflects a view commonly shared by the scholars of international relations and of democratization processes: the rule of law and democracy are more influenced by external factors (like the activity of International Organizations<sup>28</sup>) rather than internal issues<sup>29</sup>.

Rule of law is central in the UN action and mission. All the organs of the Organization deal with the concept, with different aims and perspectives.

The Secretary-general acted from different perspectives, in general keeping a more theoretical approach:

- defined the rule of law as an universal value, essential for a world of justice, opportunity and stability in his Report "In larger freedom: towards development, security and human rights for all" A/59/2005,
- gave a definition of the rule of law and listed its requisites in his Report on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", S/2004/616,
- in his Report "Uniting our strengths: Enhancing United Nations support for the rule of law", deepened the issue, A/61/636,
- in his Report "Strengthening and coordinating United Nations rule of law activities" dealt with the matter of coordinating the work on the rule of law, A/63/226,

The UN promoted also other activities related to the rule of law, also from a more operative and concrete point of view.

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28. Burchill, *The Developing International Law*, Review Article of Fox and Roth, 64 MOD. L. REV. 133 (2001).

29. THE CHANGING NATURE OF DEMOCRACY 12 (Takashi Inoguchi et al. eds., 1998); LUIGI BONANATE, TRANSIZIONI DEMOCRATICHE 51 (2000).

Above all, the UN aims to develop a clear legal framework, based on a Constitution and enforced by independent institutions of justice and governance.

Moreover, the Rule of Law Coordination and Resource Group is becoming more and more important. Briefly, this institution is responsible for the coordination of the work on the rule of law, and is chaired by the Deputy Secretary-General and supported by the Rule of Law Unit. Its membership consists of:

- the Department of Political Affairs (DPA),
- the Department of Peacekeeping Operations (DPKO),
- Office of the High Commissioner for Human Rights (OHCHR),
- the Office of Legal Affairs (OLA),
- United Nations Development Programme (UNDP),
- The United Nations Children's Fund (UNICEF),
- UNHCR,
- The United Nations Development Fund for Women (UNIFEM),
- The United Nations Office on Drugs and Crime (UNODC).

It has also agreed upon a Joint Strategic Plan for 2009-2011 and developed Guidance Notes of the Secretary General regarding UN Approach to Rule of Law Assistance, UN Approach to Justice for Children, The United Nations and Constitution-making.

## **II. THE SECURITY COUNCIL**

The activity of the Security Council in the field of rule of law is very significant. It held important thematic debates on the issue and adopted resolutions.

### **II.I. Thematic debates**

As regards thematic debates, important statements were made.

*II.I.I. Statements by the President of the Security Council in*

*connection with the Council's consideration of the item entitled "Justice and the Rule of Law: the United Nations Role" and on the item entitled "Post-conflict national reconciliation: role of the United Nations": S/PRST/2003/15, S/PRST/2004/2, S/PRST/2004/34.*

After ministers expressed their views, the Council focused on the vital importance of the issue, with a special emphasis on the context of protection of civilians in armed conflict, in relation to peacekeeping operations and international criminal justice.

The Council welcomed the offer of the Secretary-General to provide a report which could guide and inform further considerations, inviting all Member States and other parts of the UN system with relevant experience and expertise, to contribute to this process of analysis.

The Council urges the Secretariat to make proposals for implementation of the recommendations set out in Paragraph 65 of his report, including coordination of existing expertise and resources, setting up data bases and web based resources, developing meetings of experts, workshops and training and invites Member State to participate.

Moreover the Council underlines the importance of restoration of justice and rule of law in post-conflict societies, not just to punish past abuses, but also in order to promote national reconciliation and to prevent the breakout of new conflicts. Such processes must be open to participation of women.

In particular, the Council recognizes particular justice and rule of law needs in each host country, underlining that the nature of the country's legal system, traditions and institutions, should be taken into consideration. A "one size fits all" approach would be inappropriate.

In the end, the Council recalls that rule of law is, together with justice, fundamental for promoting and maintaining peace, stability and development in the world and welcomes the Secretary General's decision to address the UN activity to make the rule of law and transitional justice in conflict and post-conflict societies a priority.

*II.I.IV. Statement by the President of the Security Council in connection with the Council's consideration of the item entitled*

*“Strengthening international law: rule of law and maintenance of international peace and security”*: S/PRST/2006/28.

In this Statement the President analyses the importance of the rule of law in maintaining peace.

After recalling the principles of the UN Charter and of international law, the Council underlines the importance of the role of international law in creating stronger international relations and in promoting cooperation.

The Council further emphasizes the important role of the International Court of Justice in adjudicating disputes among States.

Moreover the relevance of rule of law is fundamental in the peace building strategies in post-conflict societies<sup>30</sup>.

The President supports the idea of establishing a rule of law assistance unit within the Secretariat and looks forward to receiving the Secretariat’s proposals for implementation of the recommendations set out in Paragraph 65 of the Secretary-General’s report on the rule of law and transitional justice in conflict and post-conflict societies<sup>31</sup>. In addition to that, the Council urges Member States to contribute national expertise and materials.

### **II.III. THE CRUX OF IT ALL: THE UN SECURITY COUNCIL AND THE RULE OF LAW - A/63/69.**

A/63/69 is a very important report regarding the issue of the rule of law. It confronts the issue from almost a theoretical point of view, giving a scientific approach to the topic, with definitions and deep analysis.

The rule of law is analysed on a national and on an international level from the Council’s activity perspective. The report contains 17 recommendations meant to guide the Council’s activity in every field in order to support the rule of law.

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30. UN Peacebuilding Commission, S.C. Res. 1645, U.N. Doc. S/RES/1645 (Dec. 20, 2005).

31. U.N. Secretary General, Report of the Secretary-General on *the rule of law and transitional justice in conflict and post-conflict societies*, U.N. Doc. S/2004/616 (Aug. 3, 2004).

In the introduction the Council is described as the most important international organ playing the role of an essential actor in the maintenance of peace and global security. But it is a political organ and the effectiveness of its action doesn't depend on something neutral, independent, totally devoted to international harmony, but obviously it depends on the will of the States. Especially the five permanent members (France, Great Britain, USA, China and Russia) and their agreements which influence the activity of the organ. The Council can act as a legislator, as a judge and as executive.

The introduction also describes the core discussion of the report, which is to enlighten the Council's activity with recommendations for enhancing an international system based on the rule of law. In addition to that, in the introduction there is a summary of the report: Chapter I and Chapter II will be the most systematic Sections, since they will deal with the concept of "rule of law" at international level and at national level: Chapter I gives definition for what is meant by the term "rule of law", Chapter II analyses how international organizations use and apply this concept, while Chapters III, IV and V analyse how such principle may be applied to the Council itself, dealing with the Council as a "creature of law", as a legislator and as a judge. Chapter VI is about the Council and the individuals, in particular about the targeted sanctions.

The last Section of the report regards the relationship between the Council and individual rights, in particular dealing with targeted sanctions. Such sanctions have been created in the 1990s in order to damage just specific individuals, limiting the consequences of economic sanctions. They have in effect improved the consequences of sanctions, but they have also been criticized. Often the criteria of choice of the targeted individuals are not clear and there is no possibility of a formal review, even if in

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32. For instance in the *Yusuf, Kadi* cases the plaintiffs claimed that a European regulation taken in conformity with a Council's decision (in particular of the Al Qaeda and Taliban Sanctions Committee) regarding economic sanctions violated their rights. The Court could review it just referring to the *jus cogens* parameters, underling that there is no other parameter for an international review.

CFI, *Yusuf and Al Barakaat International Foundation v Council of the European Union and the Commission of the European Communities*, Case T-306/01; *Kadi v Council of the European Union and the Commission of the European Communities*, Case T-315/01.

many cases challenges arose in different forums, like the European Court of First Instance<sup>32</sup>.

The report recalls then the 2005 World Summit Outcome Document, in which the Council was urged to ensure fair and transparent criteria for labelling someone in the list of recipients of targeted sanction. Kofi Annan, in June 2006 replied affirming that such sanctions can be a concrete mean for fighting terrorism, but that they will be useful only if legitimate, that is to say, if there are transparent procedures and remedies. He underlines four elements that make these sanctions fair: the person has to be informed of the sanction and of the possibility of review, moreover has the right to be heard, to directly access the judge and to review in front of an impartial organ. In the end, the Council should periodically review its own sanctions.

In effect the Council made steps forward in this direction, for instance Resolution 1730/2006 established specific procedures in delisting requests. Resolution 1735/2006 amended it in relation to listing and delisting of the Al-Qaida/Taliban sanctions committee<sup>33</sup> and new rules for informing persons were draft. But at the moment there are some States hesitant to add new names in the sanction list. Procedures pending in national and regional courts (like the European Court of Justice) will help in defining if such measures can be qualified as "fair and clear".

Within and outside the United Nations there have been many debates on which kind of review would fit to these sanctions. Proposals regarded a form of appeal in front of a tribunal<sup>34</sup>, an administrative review<sup>35</sup> or a confidential review process<sup>36</sup>. By the way, for the political issues involved, it seems difficult to reach the creation of a judicial or administrative review. The best solution seems by now the creation of small review panel

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33. *Supra* note 15.

34. For instance, the ICTY which was formed in pursuance of the Statute of the International Criminal Tribunal for Yugoslavia, S.C. Res. U.N. Doc. S/Res/827 (May 25, 1993).

35. The UN Compensation Commission, established subsequent to the S.C. Res. 692, U.N. Doc. S/RES/692 (May 20, 1991).

36. Detention Review Commission, S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

37. Final Report and Recommendations from the Austrian Initiative, *The Role of the Security Council in Strengthening a Rules-based International System*, 2004 - 2008.

of experts that examine the delisting requests and then make a report to the Security Council committee.

The report ends with Recommendation 17, suggesting the Secretary-General to present its initiatives to strengthen legitimacy and effectiveness of targeted sanctions, with a special attention to information and right of review.

In conclusion, “all Member States and the Security Council itself have an interest in promoting the rule of law and strengthening a rules-based international system<sup>37</sup>”, since the effectiveness of the action of the Council as a political actor is strictly linked to its legitimacy as a legal actor. Its accountability will depend on how it will use its extraordinary powers. The Council’s authority derives from the rule of law, since respect for its decisions is interwoven with respect of the UN Charter and international law. Without a proper mean of review, the only remedies for contrasting a wrong resolution of the Council are extreme solutions: eliminating funding or not complying with the resolution. That is to say that the Council itself is subject to the rule of law. The function of law in the Council’s action is like a “hedgerow”<sup>38</sup>: it doesn’t block decisions but channels them effectively.

### III. CONCLUSIONS

The activity of both national and international actors shows that the rule of law permeates every field of political and juridical activity. For this reason it is easy to reach a sweeping consent on the importance of this issue. On the other hand such consent may be also due to the vagueness of the exact content of the term “rule of law”.

In this article the author has tried to minimise the difficulties which exist to identify the elements that comprise of the rule of law, like circumstances of time and space or the relations between actors (that is to say, the attempts to elaborate a rule of law also on a international level), in order to present a shared notion. From a theoretical perspective, the rule of law unanimously comprises at least these three elements: government of laws, the supremacy of the law, and equality before the law, that can be found both on a national and on an international level.

As regards the operational field the activities for promoting

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38. *Id.* at para 51.

the rule of law are multifarious in nature and practise, involving participation of States, international organizations, regional organizations, private donors, NGOs: some of them being; acceptance of the International Court of Justice' jurisdiction, using other dispute resolution mechanisms, developing and codifying international law and really implementing it, fighting impunity, applying rule of law principles form peacemaking, peacekeeping, peace building towards development, giving funds for activities in this field, supporting the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit, furnishing technical assistance to Member States for an effective implementation of international law, strengthening rule of law on different levels, like governance, management, crime prevention, justice, gender violence, housing, land and property, Constitution-making and ensuring a periodic check and perusal of such activities.



# INTERNATIONAL REGIME FOR THE CONSERVATION OF MARINE ECOSYSTEMS

**Mridushi Swarup\***

## I. INTRODUCTION

Oceans cover approximately 71% of Earth's surface and comprise the greatest preponderance of the hydrosphere. While all the seas of the world share certain obvious characteristics, many have unique attributes. For example, shipping lanes and straits are used more intensively than other parts of the ocean for navigation, making accidents and spills there more likely; some areas of the sea are more ecologically fragile than others; some seas such as the Mediterranean and the Baltic, are semi-closed, inhibiting the exchange of their waters with those of the rest of the ocean and thus slowing the process of self-purification; and some parts of the ocean are utilized more intensively by humans than others, resulting in more pollution, both chronic and accidental.

The world's oceans are under stress from over-fishing, climate change, invasive species and marine pollution. United Nations Environmental Programme Ocean Atlas defines pollution sources that exist through the world as leading to a state of "silent collapse". The stresses are particularly acute in coastal areas. In addition to ocean dumping and spills, intensive shore development funnels oil and toxic pollutants into coastal waters. Nutrient run - off from farm and yard fertilizers cause algae blooms which threaten coral reefs and sea grass beds.

In this project, the various aspects related to the protection of marine ecosystems have been analyzed in detail. Also, the particular problems of the conservation of marine ecosystem and marine biodiversity and the threats with which they are confronted have been examined. Finally, the international regime for the protection of marine ecosystem has been elaborated upon with special reference to UNCLOS. Also, the international regime for the protection of marine ecosystem components has been discussed in a succinct manner.

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## II. WHAT IS MARINE ECOSYSTEM?

The problems of addressing the conservation of marine ecosystems and the maintenance of biodiversity in the oceans are qualitatively different from those of terrestrial systems. Because mankind is a terrestrial creature, there is, perhaps, inevitably a terrestrial bias in understanding of species and of ecosystem as well as the means which have been developed for their protection. This bias is reflected in the Convention on Biological Diversity itself.<sup>1</sup> Article 2 of the Convention defines "biological diversity" to include "variability amongst living organisms from all sources including...marine and other aquatic ecosystems and the ecological complexes of which they are a part", however it goes on to specify that "this includes diversity within the species, between species and of ecosystems." Nowhere else in the Convention is specific reference made to the protection of marine biodiversity<sup>2</sup> although Article 22(2) does specifically provide that contracting States "shall implement the Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea".<sup>3</sup> In fact the whole approach of the Convention – directed as it is to the biotechnology issues and, arguably a concept of national ownership of resources based on assumptions about endemic species – bypasses some of the key issues of marine biodiversity conservation.

Awareness of the importance of ecosystems or of ecosystem conservation and management is relatively new in international arena. Few international instruments rarely use this precise terminology.

## III. MARINE BIODIVERSITY: WHY IS IT IMPORTANT AND HOW IS IT THREATENED?

The oceans cover 70% of the planet yet far less is known

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1. United Nations Environment Programme Convention on Biological Diversity, 5 June 1992 (Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 9 (No. 30619)); S.JOHNSON, THE EARTH SUMMIT 82-102(1993).
  2. This was a reason why USA initially refused to become a party, THE 26TH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE, THE LAW OF SEA : NEW WORLDS, NEW DISCOVERIES, GENOA, 22-25 JUNE 1992, *The Protection of Marine Environment and the UN Conference on Environment and Development*, TUCKER SCULLY.
  3. M.Chandler, *The Biodiversity Conventions: Selected Issues of Interest to the International Lawyer* 4 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 141-175 (1993).

about the marine environment than the terrestrial; 80% of all the known species are terrestrial;<sup>4</sup> only sixteen of the 6,691 species officially classified as endangered are marine and fourteen of these are mammals and turtles – creatures which have some affinity with the terrestrial creatures.<sup>5</sup> Because of the fluid nature of the marine environment scientists suggest that there has been less opportunity or need for speciation in marine organisms, as there has been in land organisms in which species and subspecies have developed as they have become separated from each other by physical forces. This does not mean however that, oceans are a single amorphous system. Apart from the obvious variations in the oceans at different latitudes or depths, the existence of closed or semi-closed seas and of major currents, confluences and gyres in the open system means that there is a wide variety of different ecosystems in the marine environment. However, these bear little relation to the various legal jurisdictional zones established by customary international law and now to be found codified in the 1982 Law of the Sea Convention.<sup>6</sup>

As seen from the definition of biodiversity given in CBD, the common practice of terrestrial biologists of assessing biological diversity or richness in terms of number of species and subspecies in a particular ecosystem, especially number of those who are unique or endemic. However, as far as marine biodiversity is concerned speciation is low and endemism uncommon. In oceans there are far greater varieties of organisms amongst the higher taxonomic orders than species or subspecies.<sup>7</sup> In the last few years entirely new life-forms which thrive in the boiling waters around deep ocean thermal vents have been discovered which offer exciting opportunities for development of medical and industrial processes.<sup>8</sup>

Marine and coastal systems provide important food sources, and marine creatures offer a multitude of different substances

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4. G.C. Ray, *Ecological Diversity In Coastal Zones And Oceans*, 36-50, E.O.WILSON (ed.), BIODIVERSITY (1998).
  5. B. THORNE MILLER AND J.CATENA, *THE LIVING OCEAN : UNDERSTANDING AND PROTECTING BIODIVERSITY* (1991).
  6. R.R. CHURCHILL AND A.V. LOWE, *THE LAW OF THE SEA* (2nd ed., 1989).
  7. M.V. Angel, *Biodiversity in the Pelagic Ocean* 7/4 CONSERVATION BIOLOGY 760 (1993).
  8. 28TH ANNUAL CONFERENCE OF THE LAW OF SEA INSTITUTE, HONOLULU, HAWAII, 11-14 JULY 1994, *State Practice, New Ocean Uses and Ocean Governance under UNCLOS*,

which may be of significance to the medical and chemical industry.<sup>9</sup> It is well established that oceans play a key role as sinks for greenhouse gases<sup>10</sup>, but also, and perhaps more significantly, there is increasing evidence that marine biota play an important role in global chemical processes which may affect the climate change.<sup>11</sup> Thorne Miller and Catena suggest that the concentration on genetic, species and ecological diversity reflected in the work of terrestrial biologists (and strongly represented in the 1992 Convention) overshadows what has been termed functional diversity – which reflect biological complexity of an ecosystem. In their words:

“In the face of environmental change, the loss of genetic diversity weakens a population’s ability to adapt; the loss of species diversity weakens a community’s ability to adapt; the loss of functional diversity weakens an ecosystem’s ability to adapt; and the loss of ecological diversity weakens the whole biosphere’s ability to adapt.”<sup>12</sup>

The evidence suggest that marine ecosystems are rich in functional diversity, and that there are therefore dangers in transferring to the marine environment concerns about lower order diversity and about protection of rarity which have been developed in a terrestrial context.

There are threats to the very maintenance and upkeep of ecosystems. The most significant threats are posed by marine pollution from a variety of sources and activities<sup>13</sup>, from over-exploitation or indiscriminate exploitation of marine species<sup>14</sup>, as well as the destruction of the coastal habitats. A large proportion

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9. W.T. BURKE, *Id.* ; see also e.g. *The Extraction Of Chemicals Which Are Being Used In The Development Of Anti-Cancer Drugs*, THE GUARDIAN, Feb. 18, 2005.

10. J.T. HOUGHTON, G. J. JENKINS AND J. J. EPHRAMUS (ed.), CLIMATE CHANGE : THE IPCC SCIENTIFIC ASSESSMENT (1990).

11. E.A. NOSE (ed.), GLOBAL MARINE BIOLOGICAL DIVERSITY 27-29 (1993).

12. *Supra* note 5.

13. Reports of examination of four whales found dead on the Belgian coast conducted by Professor Claud Joiris of Brussels University in which high levels of toxic materials, including cadmium, mercury, DDT and PCBs were found in their blubber : THE GUARDIAN, Jan. 14, 1995.

14. D. Freestone, *The Effective Conservation and Management of High Seas Living Resources : Towards a new regime?* CANTEBURY LAW REVIEW, 341-362 (1995).

of sea creatures depend on the inshore or coastal areas for an important part of their breeding or life-cycles. The destruction or degradation of coastal habitats or the degradation of coastal water quality therefore has a major impact on a widespread of marine 'life'.<sup>15</sup> This does suggest that protection of rare and endangered species and of key and representative ecosystems may also be appropriate to certain aspects of marine biodiversity conservation. These protected areas cannot in themselves provide protection from marine pollution. It must also be said that despite the fact that 1982 UNCLOS specifically recognizes that "the problems of ocean space are closely inter-related and need to be considered as a whole."<sup>16</sup> Also, the maritime jurisdictional zones recognized by UNCLOS, inevitably make arbitrary decisions in ocean ecosystems, do not assist a holistic approach to management of these issues.<sup>17</sup>

The recognition by international environmental law of the importance of ecosystem management is relatively of recent origin. The earlier environmental treaties related simply to species protection.<sup>18</sup> It is possible to group the general classes of relevant international obligations. Firstly, those that address specific threats to marine environment and therefore to marine ecosystem.<sup>19</sup> Secondly, those obligations that address the conservation what might be called ecosystems components and finally those obligations that require conservation of marine ecosystems *per se*. Such a classification may serve to identify the strengths as well as defects and lacunae in the current legal regimes.

#### IV. CONSERVATION OF MARINE ECOSYSTEMS

The recognition of importance of management of ecosystems, rather than simply those of their components which maybe of immediate significance to mankind, is a relatively recent

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15. M. Hayashi, *The Management of Transboundary Fish Stocks under the LOSC Convention* 8 IJMCL 245-262 (1993).

16. United Nations Convention on the Law of the Sea Dec. 10, 1982, 1833 U.N.T.S. 397 (herein after referred to as UNCLOS), Preamble, para 3.

17. See generally D. Freestone, *supra* note 14; B. Kwiakowska, *The High Seas Fisheries Regime : At a Point of No Return?* 8 ILMCL 327-358 (1993).

18. 1902 Convention for Protection of Birds useful to Agriculture, 102 BFSP 969, cited in A.KISS AND D.SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 33 (1991).

19. R.R. CHURCHILL *supra* note 6; W.T.BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES* (1994).

20. Stockholm Declaration on the Human Environment U.N. Doc. A/

phenomenon. Crucial steps in development were the 1972 Stockholm Declaration<sup>20</sup> and the 1980 IUCN World Conservation Strategy which formed the basis of the 1982 UN General Assembly World Charter for Nature<sup>21</sup>, and which popularized the concept of, as well as the term, “life support systems” and which stressed the interrelationship of these with other ecological processes and genetic diversity.<sup>22</sup>

## V. INTERNATIONAL REGIME FOR THE PROTECTION OF MARINE ECOSYSTEM

### United Nations Convention on the Law of Sea, 1982 (UNCLOS)

In order to seek an answer to a wider question of whether there is a general obligation on all States to conserve marine ecosystem, it is necessary to look beyond the specific treaty obligations at customary international law. The starting point of this assessment is UNCLOS which came into force only in November, 1994<sup>23</sup> but which is widely recognized as reflective of customary law. Customary law recognizes the division of ocean into a series of juridical regimes which reflect criteria related to Coastal States’ sovereignty and resource exploitation rather than considerations of ecosystem integrity. The nature of the obligations which the customary international law, and now the

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CONF.48/14/Rev.1 (1973) (herein referred to as the Stockholm Declaration), Principle 4 provides that: Man has special responsibility to safeguard and wisely manage the heritage of wildlife and habitat which are now gravely imperiled by a combination of adverse factors. Nature conservation, including wildlife, must therefore, receive importance in economic planning.

21. GA Res. 37/7, (28 October 1982), reproduced in (1983) 23 ILM 455-460.
22. The IUCN 1980 World Conservation Strategy specifically required : (i) maintenance of essential ecological processes and life support systems, soil regeneration and protection, recycling of nutrients, and water purification; (ii) preservation of genetic diversity on which depends the functioning of most processes and life support systems , together with breeding programs necessary to the protection and improvement of cultivated plants, domestic animals and micro-organisms; and (iii) sustainable utilization of species and ecosystems (fish and other wildlife, forests and grazing lands) by humans in both industrial zones and countryside.
23. For an analysis of circumstances of the coming into force of the Convention and the UN General Assembly Resolution A/48/263 of 28 July 1994 adopting the Agreement Relating to the Implementation of Part IX of the United Nations Convention on the Law of Sea of 10 December 1982, see D. Freestone and G. J. Mangone, *The Law of Sea Convention : Unfinished Agenda and Future Challenges* A SPECIAL ISSUE OF IJMCL (1995).



1982 UNCLOS, imposes on the States in relation to the marine environment does to a large extent depend upon the juridical nature of the particular waters under consideration, consequently these jurisdictional divisions can create a major obstacle to the rational management of ecosystems or species which cross or straddle more than one zone. Broadly, the oceans are divided into the following maritime zones: internal waters – behind the coastal state baseline; a belt of territorial waters up to 12 nautical miles in breadth, a 24 nm contiguous zone with restricted enforcement jurisdiction, a 200 nm exclusive economic zone or fishing zone, and the high seas beyond these limits. Within each of these zones, the Convention envisages a different balance of rights and duties between the coastal states and other states.

UNCLOS contains a number of provisions of general significance for the protection of marine ecosystems. Nevertheless, it would probably be a mistake to think this was a conscious drafting objective *per se*. It is certainly possible to read into the provisions of Part XII of the Convention endorsement for a marine ecosystem approach to marine conservation<sup>24</sup>, although these obligations are even less precise than those relating to pollution control. Article 192 of UNCLOS recognizes a general obligation to “protect and preserve marine environment”.<sup>25</sup> In so far as this goes beyond simple protection, it can be interpreted as being an obligation to behave in a precautionary way.<sup>26</sup>

Article 194(5) specifically requires that “measures taken in accordance with this Part shall include those necessary to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”<sup>27</sup> As this provision is located within general provisions of Part XII this requires all States to protect these special ecosystems and habitats from the effects of pollution

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24. M.H. Belsky, *Management of Large Marine Ecosystems : Developing a New Rule of Customary International Law* 22 SAN DIEGO LAW REVIEW 733-763 (1985).

25. Article 192, UNCLOS.

26. The view that UNCLOS intends a proactive, rather than simply a passive role is supported by NORDQUIST (ed...), UNITED NATIONS CONVENTION ON LAW OF THE SEA: A COMMENTARY, Vol IV 35ff (edited by S.Rosenne and A.Yankov). On the development of precautionary principle in international environmental law see D. Freestone, *The Precautionary Principle* in R. CHURCHILL AND D. FREESTONE (eds.) INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 21-40 (1991); Developed further in D. Freestone, *The Road from Rio : International Environmental Law after Earth Summit* 6 JOURNAL OF ENVIRONMENTAL LAW 193-218 (1994).

originating from all sources in addition to other general conservation measures.<sup>28</sup>

Article 196 requires the States to take all measures to prevent, reduce and control pollution from “the use of technologies” under either their jurisdiction or control. This could be mean to read biotechnology or any other polluting technology. The rest of the paragraph requires the states to prevent, reduce and control the “incidental or accidental introduction of species, alien or new, to a particular part of marine environment which may cause significant or harmful changes thereto”.

However, the definition of pollution adopted by UNCLOS<sup>29</sup> does not make explicit reference to impacts on marine ecosystems. This defect has been remedied by in some regional conventions.<sup>30</sup>

In the Exclusive Economic Zone (EEZ) (Part V) coastal States are obliged to ensure “through proper conservation and management measures that the maintenance of living resources is not endangered by over-exploitation”<sup>31</sup>, taking into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.<sup>32</sup> Similar provisions apply to such species in high sea fisheries.<sup>33</sup> But these provisions “only aim to maintain the viability of such species, and .....[not] to protect their role within the food web or the functioning of the marine ecosystem as a whole.”<sup>34</sup>

### **1980 Canberra Convention on the Conservation of Antarctic Marine Living Resources**

This is arguably the first convention to be centered on

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27. Article 194(5), UNCLOS.

28. K.Gjerde, *The Law of the Sea* in J.BROADUS AND R.VARTANOV (eds.) , *THE OCEANS AND ENVIRONMENTAL SECURITY : SHARED US/USSR PERSPECTIVES* 233 (1994).

29. Article 1(4), UNCLOS.

30. 1992 Paris Convention for Protection of Marine Environment of North East Atlantic, Article 1(d); 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, Article 2(1).

31. Article 61(2), UNCLOS.

32. Article 61(4), UNCLOS.

33. See further D. Freestone, *The Recruitment of Proof for Conservation in High Sea Fisheries*, UN FAO LEGAL OFFICE (forthcoming).

34. *Supra* note 28 at 234.



ecosystem approach to conservation and has been described as “a model of ecological approach.”<sup>35</sup> Even the geographical scope of the treaty itself is unique, in that it is designed around the Antarctic ecosystem. Under Article 1, the Convention applies “to the Antarctic marine resources of the area south of 60 degrees South latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form a part of Antarctic marine ecosystem.” The Antarctic ecosystem is then defined by Article 1(3) as “the complex of relationships for Antarctic marine living resources with each other and with their physical environment.”

The sole objective of the Convention is declared to be “the conservation of Antarctic marine living resources;”<sup>36</sup> conservation however is defined to include “rational use”.<sup>37</sup> To achieve this very purpose any harvesting or associated activities has to be conducted in accordance with declared principles.<sup>38</sup>

These objectives, which clearly relate to the maintenance of the ecosystem are implemented by the Commission for Conservation of Antarctic Marine Living Resources (CCAMLR) which coordinates research on Antarctic marine living resources and adopts appropriate conservation and management measures.<sup>39</sup>

A further formal step in the protection of Antarctic Ecosystem was taken with the conclusion of the 1991 Madrid Protocol to the Antarctic Treaty on Environmental Protection.<sup>40</sup>

### **1985 Asean Convention on Conservation of Nature and Natural Resources**

Another treaty of major potential significance but, unfortunately,

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35. *Supra* note 18 at 254.

36. Article II.1, 1985 Canberra Convention on The Conservation of Antarctic Marine Living Resources.

37. Article II.2, 1985 Canberra Convention on The Conservation of Antarctic Marine Living Resources.

38. Article II.3, 1985 Canberra Convention on The Conservation of Antarctic Marine Living Resources.

39. R.R. CHURCHILL, *EEC FISHERIES LAW* 188 (1987); M.Howard, *The Convention on the Conservation of Antarctic Marine Resources : A Five Year Review* 38 ICLQ 104 (1989).

40. (1991) 30 ILM 1461.

41. Kuala Lumpur, 9 July 1985, reproduced in KISS AND SHELTON *supra* note 18 at 493.

still not in force after a decade is the 1985 ASEAN Convention on Conservation of Nature and Natural Resources.<sup>41</sup> This Convention reflects in its wording the concepts contained in the 1980 IUCN World Conservation Strategy, embracing a clear ecosystem approach to conservation. Kiss and Shelton describe this Treaty at “the most comprehensive approach to viewing conservation problems that exist today.”<sup>42</sup>

The Convention recognizes “the interdependence of living resources, between them and other natural resources, within the ecosystems of which they are a part.” and is divided into eight chapters.

It is tempting to observe that the major treaties calling for marine ecosystem conservation considered thus far are either limited in geographical scope, or not yet in force, or both.<sup>43</sup>

## VI. GENERAL CUSTOMARY INTERNATIONAL LAW

There is a general obligation first promulgated by Principle 21 of Stockholm Declaration and now to be found in Principle 2 of Rio Declaration to ensure that “activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction.”<sup>44</sup> This obligation not to cause damage extends not simply to activities physically located within the State territory but also to activities within the State jurisdiction.

Customary international law would impose responsibility on States under this principle for a range of activities which impact

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42. Kiss and Shelton p. 279.

43. To the ASEAN Convention could perhaps be added the African Convention on Conservation of Nature and Natural Resources, Algeria, 15 September 1968, 1001 UNTS 3. The treaty makes no explicit reference to the marine or coastal environments of contracting states, and none of the species listed for protection appear to be marine species. Nevertheless, there appears nothing in the treaty to exclude marine/ coastal ecosystems from its ambit. It too is not in force yet.

44. Principle 21, Stockholm Declaration; Rio Declaration on Environment and Development, U.N. Doc.A/CONF.151/26 (June 1992) 31 I.L.M. 1261 (herein after referred to as Rio Declaration), Principle 2.

45. Report of Experts Group on Environmental Law of the World Commission on Environment and Development, published as *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (1987), J.G.LAMMERS (ed.) 80.

on marine ecosystems whether such activities take place within the areas of national jurisdiction or outside or straddling such areas.<sup>45</sup> Activities which could be argued to cause damage to marine ecosystems and to fall foul of this principle would include marine pollution – particularly that emanating from land based sources and activities<sup>46</sup>; it could also be extended to fishing and related activities which impact upon rare and endangered marine species or their habitat.

## **VII. REGIMES FOR THE CONSERVATION OF MARINE ECOSYSTEM COMPONENTS**

Historically, the two main techniques which have been utilized by international conventions for the conservation of marine species are derived from those taken for terrestrial species, namely, the regulation or prohibition of the poaching of designated species and the protection of habitat by designation of protection areas.

## **VIII. PROTECTION OF SPECIES**

The protection of designated species has habitually been addressed by the imposition of restrictions and prohibitions on the harvesting, taking or killing of target species. The approach was taken by the 1946 Whaling Convention<sup>47</sup>, by the various seal hunting regulatory agreements<sup>48</sup> and by the 1973 Polar Bears Agreement.<sup>49</sup> Such a strategy is still maintained as a part of approach adopted by more modern generic or regional protected species treaties such as the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals<sup>50</sup> and the regional treaties concluded under UNEP Regional Seas Programme.<sup>51</sup>

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46. This principle is also utilized for high seas fishing in the recent UN FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1994.

47. 1946 International Convention for Regulation of Whaling (Washington) 161 UNTS 143.

48. 1911 Treaty for the Preservation and Protection of Fur Seals. 104 BFSP 175; 1975 Interim Convention on the Conservation of North Pacific Fur Seals, 314 UNTS 105; 1972 Convention for Conservation of Antarctic Seals, 11 ILM 251.

49. 1973 Agreement on the Convention of Polar Bears, 13 ILM 13.

50. 1973 Bonn Convention (1980) 19 ILM 15.

51. 1985 Framework Convention for the Protection, Management and Development of Marine and Coastal Environment of the East African Region.

## IX. PROTECTED AREAS

The second key technique, often used in combination with protection of species and in modern treaties increasingly merge with it<sup>52</sup>, is the establishment of protected areas either to protect the habitats of specific species or as representative examples of ecosystems or habitats. These may be important isolated areas or take their place within a systematic network permitting for example transnational migration.<sup>53</sup>

In the terrestrial environment between 5-8% of the total world land mass now lies in protected areas. Despite the fact the sea covers more than two and a half times the land area, marine protected areas may cover an area less than half that of terrestrial protected areas.<sup>54</sup>

## X. REGULATION OF TRADE IN WILD SPECIES

One of the major threats to marine species such as sea turtles is the commercial trade in products such as turtle shell. Other well known threats to marine ecosystems are posed by over exploitation of shells and corals for the tourist souvenir trade and of reef fish for the aquarium trade. CITES provides the main regulation of such trade, although a number of treaties provide independent proscriptions or regulation of such trade.<sup>55</sup>

## XI. CONCLUSION

It is paradoxical that although the particular problems of conservation of many marine creatures, make them particularly suitable to regulation at an international level under a treaty on biological diversity, the most important discussions concerning conservation of marine biological diversity are currently taking place in the context of other forums – those relating to land based

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52. 1990 Agreement on the Conservation of Seals in the Wadden Sea. See D. FREESTONE AND T. IJSTRA, *THE NORTH SEA : PERSPECTIVES ON REGIONAL ENVIRONMENT COOPERATION* 280 – 287 (1991).

53. Objective of 1979 Berne Convention and the 1992 EC Habitats Directive.

54. R. Kenchington, C. Bleakly and S. Wells, *A Global Representative System of Marine Protected Areas*, Draft Report, Great Barrier Reef Marine Park Authority IUCN, 1995.

55. 1990 Kingston Protocol on Specifically Protected Areas and Wildlife (SPAW), Article 11 and Article 25 specifically relates to the relationship with CITES.

resources, straddling fish stocks or at a regional level.

The recognition by the 1992 Convention on Biological Diversity of the issue of the “conservation of biological diversity as a matter of common concern of humankind” implies that all states have a legal interest in the issue as well as positive responsibility to safeguard it. However, this “common concern” still requires a more obvious focus than national actions or diverse regional or sectoral actions, for much of the attention has to be taken in international waters as well in coastal waters or in ways that will reflect natural ecosystem boundaries rather than national maritime jurisdictional boundaries.

It can thus, be concluded that there is an existence of a substantial body of treaty law which seeks to address one or more aspects of marine ecosystem conservation. Although, a few treaties actually commit themselves to this, it is clear that a large number of treaty regimes are developing an ecosystem approach through their parties’ interpretation of their existing treaty obligations. UNCLOS can be seen as a most positive force in the crystallization of the general obligations of States to protect the marine environment. Nevertheless, important though the obligations of Part XII are in this respect, they too require further substantial elaboration and implementation.

A protocol on the conservation of marine biodiversity in context of protection of marine ecosystems would be an obvious way of seeking to remedy the lacunae of existing regimes and refocusing attention on this crucial, but somewhat neglected, aspect of biodiversity debate.

# ECONOMIC SANCTIONS IN THE HUMAN RIGHTS ERA EVOLVING IN THE WAKE OF MDGs AND THE KADI JUDGEMENT: MILLENNIUM DEVELOPMENT GOALS AND THEIR BEARING ON HUMAN RIGHTS

Harjass Singh\*

## I. INTRODUCTION

Whether we like it or not, we live in a time when ruthless torture of untried individuals is abetted by the only remaining pole in a unipolar world, when economic interests of nations that are spoilt for riches prove a hindrance in the arrest of perpetrators of genocide and crimes against humanity, when nations are free to impose unchecked embargos on vast inhabited areas, implicitly accepting a forfeiture of human life and dignity<sup>1</sup>. At such a time, it becomes necessary for legal academia to bring to light the legal obligations of the international community, thereby discharging the burden placed on them by a society that is becoming increasingly conscious of human rights and ancillary concepts.

At the turn of the millennium, the idealistic members at the United Nations Development Program (UNDP), in an effort to cleanse the world of some of its fundamental evils, formulated eight 'Millennium Development Goals' (MDGs). These goals include the eradication of extreme poverty and hunger; achieving universal primary education; promotion of gender equality and empowerment of women; reducing child mortality; improving maternal health; combating HIV/AIDS, malaria and other diseases; ensuring environmental sustainability; and developing a global partnership for sustainability.<sup>2</sup>

*Prima facie*, these MDGs target some of the fundamental ills that plague society's quest for development. It is also clear that proliferation of such hazards in society result in infringement of the most basic human rights that have been recognised and incorporated not only under the Universal Declaration of Human Rights (UDHR), but also under Specific International Human Rights Instruments and Domestic legal enactments of most UN member states.

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1. Richard Goldstone, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 258 – 283, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).
2. UNITED NATIONS DEVELOPMENT PROGRAMME, MILLENNIUM DEVELOPMENT GOALS (2000).

Through the course of this paper, the researcher shall look to highlight the negative impact that General Economic Sanctions have on the domestic populations of sanctioned nations and their neighbouring States. It is contended that General Economic sanctions display scant regard for the goals that the UNDP has sought to propagate, thereby resulting in gross violations of the elementary human rights that are so inextricably entangled with the MDGs.

The researcher shall also analyse Targeted Economic sanctions as an alternative approach, and point out structural flaws with implementation of such measures that have emerged in light of the *Kadi Judgement*<sup>3</sup>. On weighing the pros and cons of both these approaches, the researcher humbly submits his findings regarding the human rights challenge that the traditional understanding of Economic Sanctions poses.

## II. UNDERSTANDING ECONOMIC SANCTIONS

In understanding the harms of economic sanctions, it is important to begin by dwelling on their basis and developing a lucid understanding about them. Economic Sanctions have long been considered a fairer and more peaceful method of dispute resolution and intervention than the military alternative. Kofi Annan has even gone to the extent of stating that they are “a necessary middle ground between war and words.”<sup>4</sup> However, it is submitted that the harms accruing from economic sanctions are just as bad, if not worse than those posed by military sanctions.

International politics and international law enmesh in a way to provide us with four generic instruments of policy, which individuals and groups implement in trying to influence others.<sup>5</sup> These include the *Military Instrument*, characteristic of which is extreme levels of coercion by engaging in violence against the sanctioned party. The second happens to be the *Diplomatic Instrument*, which involves persuasive communication or downright coercion, aimed at the political elite of the target nation. The third instrument may be identified as *Propaganda*, involving the propagation of signs and symbols directed at the relevant strata of a community, not limited to its elite. However, the most important instrument in our present discussion is the *Economic*

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3. Joined Cases C-402/05P & C-415/05P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council of Eur. Union & Comm'n of Eur. Cmtys., 2008 E.C.R. II-3533

4. Bryan P. Schwartz & Christopher C. Donaldson, *Protecting the Playground: Options for Confronting the Iranian Regime*, 35 BROOK. J. INT'L. L. 395 (2010).

5. W. Michael Reisman, *Sanctions and International Law*, INTERCULTURAL HUM. RTS. L. REV. 9 (2009).



*Instrument*, which is characterised by the grant of or curbing in indulgences or deprivations from the target.<sup>6</sup>

Since States and non-state actors use all four instruments in varying degrees, international law has endeavoured long and hard to prescribe the contingencies for and modalities of their use. However, success has been hard to come by.<sup>7</sup>

It is important to establish at the outset that only when these instruments are carried out under authorisation by the international community are they appropriately accorded with the status of 'Sanctions', thereby making them military sanctions, diplomatic sanctions, ideological sanctions or economic sanctions.<sup>8</sup> When individual states act in such a manner without express authorization of an international organization, they constitute various forms of concentrated unilateral violence even though such States would try to accord the status of 'sanctions' to their actions.

In recent years, the preferred foreign policy instrument has been that of 'Economic Sanctions.' The United Nations Security Council (UNSC) has felt the need to impose economic sanctions a total of 18 times. However, like with all efforts of the Security Council, the Cold War curtailed and limited economic sanctions to just one instance against Southern Rhodesia and one against South Africa.<sup>9</sup> The end of the Cold War in 1991 has seen a spike in the regularity with which these sanctions are imposed. Currently, UNSC sanctions are outstanding against Iran, as well as certain terrorist organizations. In recent years, sanctions were nearly imposed against Zimbabwe and against North Korea.<sup>10</sup>

### III. TYPES OF ECONOMIC ACTIONS AND THEIR IMPACT

The economic instrument also encompasses different types of actions. Major classes of this instrument that the researcher believes are pertinent given the nature of the present discussion are 'Positive and Negative' Economic Instruments, and 'General and Targeted' Economic Sanctions.<sup>11</sup>

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6. *Id.*

7. *Id.*

8. *Id.*

9. Orde F. Kittrie, *New Sanctions for a New Century: Treasury's Innovative Use of Financial Sanctions*, 30 U. PA. J. INT'L. L. 789 (2009).

10. Padriac Foran, *Why Human Rights Confuse the Sanctions Debate: Towards a Goal-Sensitive Framework for Evaluating United Nations Security Council Sanctions*, 4 INTERCULTURAL HUM. RTS. L. REV. 123 (2009).

11. Eckart Klein, *Some Observations on the Kadi Judgement of the European Court of Justice*, 4 INTERCULTURAL HUM. RTS. L. REV. 111 (2009).

The Positive Economic Instrument would generally be aid. This can take many forms, like direct funding from national governments or the International Monetary Fund.<sup>12</sup> Economic Aid can also be engaged in enabling the target nation to engage in self-help in the future. A viable example pointed out by Schwartz and Donaldson would be 'aiding Iran's push to become a member of the World Trade Organization'. This use of the carrot method to influence the regime, may serve the world in influencing Iran's behaviour without imposing the negative consequences of sanctions.<sup>13</sup> Personally, the researcher believes that the "carrot method" is of greater consequence at the international level than the "stick method", given the "rule of reciprocity" that governs almost all significant actions of sovereign nations.

'Negative Economic Instruments' is an obvious reference to economic sanctions, which may be undertaken against the target state in a variety of methods. The most prevalent among these methods is General Economic Sanctions.

General Economic Sanctions refer to restrictions imposed on the general trade and economic relations with the sanctioned nation. Woodrow Wilson, a staunch supporter of (General) Economic Sanctions, spoke of them thus:<sup>14</sup>

*"A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside of the nation boycotted, but it brings oppression upon the nation, which in my judgment no modern nation could resist."*

It is this stance of a veritable supporter of general economic sanctions that also helps highlight the pressing need to review them in an era that sees the international community make tall claims about its human rights ambitions. In saying that such measures do not cost a life outside the boycotted nation, the proponents of such sanctions concede to the fact that they are extremely oppressive to inhabitants (innocent ones included) of the nation that is sanctioned.

General economic sanctions such as those imposed by the UNSC on Iraq during and after the liberation of Kuwait have since been recorded to have had a telling impact on the population resulting in

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12. See ALIREZA JAFARZADEH, *THE IRAN THREAT: PRESIDENT AHMADINEJAD AND THE COMING NUCLEAR CRISIS*, 158 (2007), as cited in SCHWARTZ AND DONALDSON, *supra* note 6.

13. *Id.*

14. REISMAN, *supra* note 7.

a serious decrease of supply for food and medicine. These sanctions aim to inflict injury to the target nation, thereby coercing an agreeable response. However this injury almost always ends up being inflicted on most vulnerable members of society as the political and economic elite continue to thrive. There is wide consensus amongst researchers and philosophers that such economic sanctions have a debilitating impact on the poorest and most disenfranchised members of the target State. In 1999, *Foreign Affairs* magazine estimated that, according to UN estimates, UNSC “economic sanctions may well have been a necessary cause of the deaths of more people in Iraq than have been slain by all the so-called weapons of mass destruction throughout history.”<sup>15</sup> In 1999, this figure amounted to more than a half a million people and unfortunately, in the past decade, this staggering number has only grown steeper.

This brings me back to my initial point about how when basic human rights such as access to fundamental amenities for sustainable life are taken away, the UNDP’s Millennium Development Goals seem like an unattainable dream charted out by buoyant believers of Utopia. If food and medicine are denied to a majority of the population, it automatically hinders the ability of a nation to achieve the MDGs. Also, they happen to contravene, to varying extents, Article 2<sup>16</sup>, Article 3<sup>17</sup>, Article 22<sup>18</sup>, Article 25(1) and (2)<sup>19</sup> as well as Article 28<sup>20</sup> of the Universal Declaration of Human Rights.<sup>21</sup>

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15. John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, FOREIGN AFFAIRS, May-June 1999, at 43, 51.

16. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

17. Everyone has the right to life, liberty and security of person.

18. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

19. Article 25 (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Targeted Sanctions were developed as a new generation of sanctions that were heralded as a welcome change as they would limit the burdens imposed on innocent populations by general economic sanctions.<sup>22</sup> Instead of targeting an entire population that, in most cases, is not at all or only in part responsible for the acts of their leaders, these Targeted/Smart sanctions of the UNSC aim to target only responsible politicians or military chiefs through imposing restrictions on their opportunities to leave their country, freezing their assets abroad, etc.

In the war against the Taliban and the Al Qaeda in Afghanistan, this strategy was expanded to non-State actors. When the fight against international terrorism heightened, individuals like Osama Bin Laden and others suspected of supporting Al-Qaida were also taken under this instrument's fold.<sup>23</sup>

#### IV. THE KADI JUDGEMENT AND TARGETED SANCTIONS

In the Kadi Judgement<sup>24</sup>, there emerged a glitch in the well-intentioned introduction of Targeted Economic Sanctions. In this case, Mr. Kadi, residing in Saudi Arabia, was identified and listed by the Security Council's Sanction Committee in 2001 as an individual (among others) associated with Osama Bin Laden and the Al-Qaida organization.<sup>25</sup> This resulted in the Security Council passing the relevant Resolution, which held that his funds and other financial assets would be frozen

and will not be made available to him as well as to the other listed individuals.<sup>26</sup>

According to European Union Law, the European Community is authorised to enforce binding Security Council resolutions on behalf of European member States. The European Community in the present case did so by enacting a regulation which, according to the European

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20. Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

21. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

22. KLEIN, *supra* note 13.

23. *Id.*

24. Joined Cases C-402/05P & C-415/05P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council of Eur. Union & Comm'n of Eur. Cmty's., 2008 E.C.R. II-3533, as cited in KLEIN, *supra* note 13.

25. *Id.* at 31.

26. Giacinto Della Cananea, *Global Security and Procedural Due Process of Law between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council*, 15 COLUM. J. EUR. L. 511 (2009).

Community's law, is directly applicable in member States.<sup>27</sup> This regulation propagated the UN Security Council's wishes of freezing of funds and assets, as well as prohibition on making economic resources available to individuals who had been recognised on their list. Since Mr. Kadi figured on the list, such action was directed against him as well. Though his proceedings against the Council and Commission of the European Union before the Court of First Instance in Luxembourg were dismissed; on appeal, he succeeded before the European Court of Justice which annulled the contested regulation.<sup>28</sup>

This path-breaking judgement by the European Court of Justice is characterized by the fact that the Court assumed jurisdiction over the case by evading the tricky question of whether it could review binding UNSC Regulations. The court held that the EC regulation in question would not be considered an act attributable to the United Nations as the regulation is in essence a legal act issued by an organ of the European Community. Since the Court has jurisdiction over acts of the European Community, the court was entitled to assume jurisdiction.<sup>29</sup>

From its findings, the Court inferred that it would have to complete a full review of the lawfulness of the regulation taking account of the fundamental rights that form an integral part of the general principles of the European Community's law. The Court proceeded to do this disregarding the fact that the controversial regulation was simply enacted to effectuate a UN Security Council resolution adopted as a Chapter VII measure.<sup>30</sup>

After establishing its jurisdiction over the case at hand, the Court went on to find that fundamental rights claimed by Mr. Kadi had "patently" not been respected by the Community's organs.<sup>31</sup> Although the Court conceded that Mr. Kadi's right to be heard before the UN Security Council entered his name in the list for the first time had not been violated, there was still an infringement of his right because there was no disclosure of information as to why he had been included on the list. The appellant's right to defend himself was also curbed as evidence against him was withheld before the European Community judicature. The Court also held that his right to an effective remedy

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27. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412, arts. 60, 301 and 308 taken together constitute the legal basis for the Court's action

28. KLEIN, *supra* note 13.

29. *Id.*

30. MALCOLM N. SHAW, INTERNATIONAL LAW 1124-1133 (5<sup>th</sup> ed. 2007).

31. CANANEA, *supra* note 28.

had been therefore deemed infringed. Finally, the Court held there had been a violation of the appellant's right to respect for property. This violation did not accrue from freezing of assets per se. Instead, the Court reasoned that procedural requirement of presenting a reasonable opportunity for Mr. Kadi to put his case for review to the competent authorities was not granted, thereby vitiating this right.<sup>32</sup>

Critics of this judgement have accused it as bordering on the line of activism. It has also been contended by some critics that the judgement moves to 'undermine the legal and political relevance of Security Council resolutions, particularly in combating international terrorism.'<sup>33</sup>

However, on carefully analysing the judgement, it is observed that the European Court of Justice has categorically stated that it is not competent to review the Security Council resolutions as such. Further, critics' claims that the judgement is a major blow to the implementation of Security Council resolutions are unfounded. While critics are quick to claim that 'this could upset the whole U.N. mechanism for the maintenance or restoration of international peace and security'<sup>34</sup>, the researcher believes that, if anything, the judgement has served to point out a few glaring holes in the procedural functioning of various UN organs. The fact that the UN Security Council authorises itself to freeze individuals' accounts and assets without providing an opportunity to defend their stand, along with the fact that there appears to be no right to a fair hearing or even information as to the evidence relied on before handing out targeted Economic Sanctions to the affected party/ parties is clearly in contravention to the founding principles of the Universal Declaration of Human Rights and all the specific Human Rights treaties that base themselves on these principles.<sup>35</sup>

## V. IMPACT ASSESSMENT

It is submitted that the much heralded Economic Sanctions need to be reviewed for procedural flaws that leave them so inherently exposed. While the deficiencies of General Economic Sanctions are well documented and it is internationally recognised that the rights of the

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32. *Id.*

33. Contended by KLEIN, *supra* note 13.

34. *Id.*

35. Mainly the International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966) and the International Convention on Economic Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966).

most vulnerable groups are trampled upon by them, the alternative method of Targeted Economic Sanctions has also met with some conspicuous hurdles.

While the conclusion that the Court of First Instance reached in the Kadi Judgement toes the line that presently established international law sets, the decision of the European Court of Justice shows great maturity and clear reasoning in pointing out the evident deficiencies in the Security Council's procedure imposing sanctions on individuals. Instead of merely looking at the Kadi Judgement as a case regarding an individual's right to enjoyment of his own property and construing this as a proper defence against Sanctioning authorities, this judgement should be raised to the pedestal of one that raises pertinent questions regarding the procedure used to enforce international law while driving home its call for review of this structure. The Kadi Judgement may well be the push the Security Council needed to review its own practice in enforcing the otherwise preferable 'Targeted Sanctions'.

Therefore, the researcher concludes that positive Economic Instruments are better positioned to respect Human Rights while being implemented, and therefore need to be given adequate consideration before resorting to the use of Sanctions.

However, where Sanctions are being resorted to, in the interests of serving the greater good, Targeted Sanctions are better positioned for success. This is highlighted from the fact that unchecked embargos and trade barriers such as the ones seen in Operation Cast Lead<sup>36</sup> have been found wanting on Humanitarian Grounds time and again. Yet, there is a glaring need to respect procedural safeguards for Fundamental Rights and Freedoms while imposing Targeted Sanctions. If the Kadi judgement and its brave yet thought-provoking stance does end up hastening a review of such UN procedure behind targeted sanctions, regardless of whether it has strayed down the road of Activism, it would have served its purpose.

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36. GOLDSTONE, *supra* note 3.



# MURKY WATERS: TAX EXPENDITURES IN THE SHIPPING SECTOR

Archit Dhir\*

## I. INTRODUCTION

Tax expenditures are essentially measures in a budget which depart from a normative structure of tax with the intention of providing benefits to a particular group of persons or an industry by using tax incentives, instead of a direct spending mechanism.<sup>1</sup> The concept of tax expenditure is often credited to Stanley Surrey, a Harvard Law School professor and the Assistant Secretary of the Treasury for Tax Policy (1961-69) in the US government. This article seeks to study the concept of tax expenditure in context of special tonnage tax benefits given to the shipping industry under Chapter XII-G, Section 115 V of the Income Tax Act, 1961.

## II. HYPOTHESIS

It is argued that the tax expenditure benefits intended by the government are achieved by the tonnage tax regime and concerns propounded by Prof Surrey do not hold much ground in this context.

## III. RESEARCH QUESTIONS

1. How is the tonnage tax regime a form of tax expenditure?
2. Whether the tax expenditures incurred by the government under the tonnage tax regime fulfill their intended objective?
3. Whether the concerns put forth by Prof Surrey arguing in favour of direct expenditure are addressed?

I will first briefly explain the concept of tax expenditure and outline three main arguments put forth by Prof. Surrey against the use of these indirect benefits as opposed to direct expenditure. I would then explain the concept of tonnage tax and how it is

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1. Surrey & McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUS. & COM. L. 679, 683 (1975-76).

a mode of indirect government expenditure aimed to support the shipping industry. I would then proceed to analyse two particular conditions of the tonnage regime i.e. of transfer of fund to a reserve account, and the officer training requirement, and demonstrate how these two conditions aim to fulfill the social and economic goals. In the last part I would address some concerns expressed with the tonnage tax regime. I conclude the paper by demonstrating how the thesis statement taken in the introduction is correct.

The author is limited by non-availability of recent statistical data relating to the shipping sector.

#### IV. TAX EXPENDITURE

In order to understand the concept of tax expenditure, let us divide the process of charging into two components. The first component consists of defining the normative tax base, the identification of the taxable unit, the time period, the applicable tax rates and the administration of tax.<sup>2</sup> The second component consists of the deviation from this normative structure for the purpose of non tax goals aimed to achieve desired investments, savings or relief to an industry.<sup>3</sup> Thus the taxing jurisdiction waives off its tax claim by providing a special reduction in tax payment and providing government assistance which would have been otherwise a part of the overall government spending.

Prof. Surrey published hundreds of articles, delivered tons of lectures and wrote numerous books on the concept of tax expenditure. In an article published in the Harvard Law Review in 1970, Prof. Surrey argued that *"the tax incentive is generally inferior to the direct subsidy as a means of achieving social goals"*.<sup>4</sup> Later that year, in another article in the same journal he argued in favour of *"replacing tax expenditures with direct expenditure programs if governmental assistance is found necessary."*<sup>5</sup> In a third article,<sup>6</sup>

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2. Surrey & McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20(2) Boston College Law Review 226, 228 (1979).

3. *Id.*

4. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A comparison with Direct Government Expenditure*, 83 HARV. L. REV. 705 (1970).

5. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1971).

dealing with Least Developed Countries (LDC), he warned against the “*governments committing itself to excessive control over taxing system*” while implementing tax expenditure schemes. Let us study the introduction of tonnage tax by the Indian government in 2004 in background of these three statements, and analyse whether the intended benefits have been achieved or whether direct spending would have served as a better alternative.

## V. TONNAGE TAX

Shipping plays an important role in the transport sector of the Indian economy. Fiscal policy, in particular taxation, is considered as an important factor which has an impact on investment decisions and national registrations done by shipping companies.<sup>7</sup>

A tonnage tax is a special tax regime for the shipping industry wherein a notional profit is computed based on the number and size of the ships operated. A standard income tax rate is then applied to this profit. For the purpose of calculating tonnage tax, the shipping tonnage will be converted into a notional profit on which the prevailing corporate tax rate is applied to arrive at the tonnage tax.<sup>8</sup> The tonnage rate is so set so that the profit, and subsequently the tax paid, is at a minimum.

An illustrative example of computation of tonnage tax is:

Let us assume that there is a tonnage tax company operating one qualifying ship<sup>9</sup> throughout the year. The net tonnage of this ship is 50,000 tons, and the applicable corporate tax is 33%.

Applying the table given under Section 115 VG (3), the daily profit would be calculated as:

For the first 1000 tons:  $(1000/100) \times \text{Rs.}46 = \text{Rs. } 460$

For the 1000- 10000 tons:  $(9000/100) \times \text{Rs.}35 = \text{Rs. } 3,150$

For 10000-25000 tons:  $(15000/100) \times \text{Rs.}28 = \text{Rs. } 4,200$

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6. Surrey & Maktouf, *Tax Expenditure Analysis and Tax and Budgetary Reform in Less Developed Countries*, 15 LAW AND POL’Y INT’L BUS, 739 (1983).

7. Discussion Document on South African Tonnage Tax Proposal, [www.treasury.gov.za/.../Tonnage%20tax%20discussion.pdf](http://www.treasury.gov.za/.../Tonnage%20tax%20discussion.pdf)

8. Tonnage Tax at last for a Smooth Sailing, *The Hindu*, <http://www.thehindubusinessline.com/2004/07/09/stories/2004070901460300.htm>

9. Income Tax Act of 1962, Section 115 VD (1962).

For > 25000 tons:  $(25000/100) \times \text{Rs.}19 = \text{Rs. } 4,750$

Thus the total daily notional profit would be: Rs (460+3150+4200+4750)  
i.e. Rs. 12,560

The annual notional income would be: Rs 12,560\*365 = Rs 45,84,400

(This is assuming that the ship operated throughout the year. Had it been, say 180 days, we would multiple the annual notional income by 180, instead of 365)

The tonnage tax payable would be: Rs (45,84,400\*33/100) = Rs. 15,12,852

This tax payable normally works out to be much less than what would have been taxable on the income of a shipping company. The difference in the actual tax collected by the government under the tonnage regime and what would have been collected on the actual income is the tax expenditure or the indirect spending by the government. The tonnage tax regime is not mandatory because certain shipping companies may find that they would pay more tax under a tonnage tax regime. For example, a shipping company may have continuous losses, and since under a tonnage tax regime there are no shipping losses, the company would have to pay taxes. However, once elected, this regime comes in with a lock in period of 10 years.

After continuous demands from the sector, the Indian government was forced to introduce a tonnage tax regime in April 2004.<sup>10</sup> Prior to 2004, initially shipping companies were subjected to a corporate tax of around 35%, with effective rate of taxation working out to around 22%, and from 2002-03 onwards,

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10. PLANNING COMM., The Working Group Report on Shipping and Inland Water Transport for the 11th Five Year Plan, [www.planningcommission.gov.in/aboutus/committee/.../wg11\\_ship.pdf](http://www.planningcommission.gov.in/aboutus/committee/.../wg11_ship.pdf)
  11. Income Tax Act 1962, Section 33AC (relating to reserves for shipping business which provides for hundred per cent deduction of the profits derived from the business of operation of ships has also been amended to provide that no deduction shall be allowed under the said section from assessment year 2005-06 onwards).
  12. Amit Mitra, Tonnage Tax Regime: A shot in the Arm for Shipping Sector, <http://www.thehindubusinessline.com/2004/02/04/stories/2004020402320600.htm>

with the benefits under Section 33 AC of the ITA,<sup>11</sup> the effective rate of taxation had been about 7.5 per cent, which was still considered amongst the highest in the world.<sup>12</sup> The main aim behind introduction of tonnage tax was to increase the tonnage capacity of Indian ships and avail the ancillary benefits.

The choice of benefits under the tonnage tax has certain conditions attached to it. It is through these conditions that the government seeks to fulfill its economic and social goals aimed at the shipping sector. Let us analyse two of such conditions.

## VI. TONNAGE TAX RESERVE ACCOUNT

Section 115VT deals with the transfer of profits to a “tonnage tax reserve” account. Sub-section (1) of the said section provides that *“a tonnage tax company shall be required to credit to a reserve account an amount not less than twenty per cent of the book profits derived from the activities”* referred to in clauses (i) and (ii) of sub-section (1) of section 115V-I in each previous year. Sub section 3 of the Section 115VT conditions that the amount in this reserve account would be used for *“acquiring a new ship for the purpose of the business of the company.”* Thus the government ensures continuous expansion of fleet of the country by giving tax exemptions. It helps build infrastructure, and also ensures that equity comes in from internal resources. With the greater number of ships coming under the tonnage tax regime, there would be increased collection of taxes, which sets off the reduced incidence of taxation initially. The government is thus indirectly spending on building infrastructure and also increasing its tax base, which on a long term basis would set off the losses incurred by taxing a shipping company on its notional income. As an alternative, the government could have tried to seek this objective of expansion of fleet through direct spending. This would have been possible through soft loans. However, this is not economically viable because of possibilities of default and increased pressure of liabilities on the shipowners. The government recently rejected the demand of local shipowners to set up a corpus of Rs10,000 crore in soft loans for purchasing ships amid a liquidity crunch in the global financial markets on these grounds.<sup>13</sup> Thus the transfer of funds to a corpus, and its utilization for expanding the shipping

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13. Indian Shipowners Clamour for Protection, The Wall Street Journal, (Sep. 04, 2009), <http://www.livemint.com/2009/09/04002250/Indian-shipowners-clamourfor.html?h=B&usg=AFQjCNGe bZkl0lflWgGv8AJSJFoR1stWfQ>

fleet using internal resources, is an efficient way of government expenditure.

The success of this indirect government expenditure is not only theoretical. An unprecedented growth of 23.6% in combined shipping tonnage happened in only after 2004-05 and the country's tonnage grew thereafter from 7.05 million GT on 01.07.2004 to 8.42 million GT as on 01.01.2007.<sup>14</sup> The freight revenue retention in 2007 was Rs. 5962 crores, which was an increase of Rs. 1646 crore from 2004.<sup>15</sup> As on 31<sup>st</sup> March 2009, Shipping Corporation of India (SCI) had Rs 200 crore in its reserve account.<sup>16</sup>

## VII. TRAINING REQUIREMENT

Section 115VU relates to minimum training requirement for tonnage tax companies. The said section provides that "*a tonnage tax company, after its option has been approved under sub-section (3) of section 115VP, shall be required to comply with the minimum training requirement in respect of trainee officers in accordance with the guidelines framed by the Director General of Shipping and notified in the Official Gazette by the Central Government.*" The government thus seeks to build a pool of maritime officers without directly spending on their training. It instead puts the onus on the shipping company, and indirectly pays for this through taxing less under the tonnage scheme. What is the government's intention behind this tax expenditure?

Indian shipowners face a shortage of about 1,000 officers, according to the Baltic and International Maritime Council (BIMCO), world's largest shipping body.<sup>17</sup> Of the 26,900 Indian officers currently employed on board ships globally, 8,900 are on Indian ships, while almost double the number i.e. 18,000 are on foreign ships.<sup>18</sup> Thus once a company opts for benefits under the tonnage regime, it has to contribute towards man power development of marine officers. This serves the dual purpose of

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14. *Supra* note 10, at p.5.

15. *Supra* note 10, at p.5.

16. Government plans to sell atleast 10% SCI stake, The Wall Street Journal, (May 13,2010) <http://www.livemint.com/2010/05/13205015/Govt-plans-to-sell-at-least-10.html>

17. Buying Ships? Great. But who will Operate Them?, The Wall Street Journal, (Jun. 26, 2008), <http://www.livemint.com/2008/06/26231953/Buying-ships-Great-But-who-w.html>

18. *Id.*

employment opportunities for local sea farers as well as expansion opportunities for shipping companies with increased number of trained manpower. Increased number of trained personnel attracts new investors and greater investments. If the government had tried to solve this problem through direct spending, there would have been no guarantee of employment to these trainees, and furthermore, there is no mode of ensuring that the trained personnel would not join foreign ships. However, with the tonnage tax regime being applicable only to Indian companies, the training requirements would benefit Indian shipping companies only.

The government is also supplementing its indirect spending with direct spending. This is where criticism put forth by Prof. Surrey becomes relevant. The objective behind training requirement would be rendered otiose if there are no good institutes. Realising this, the government has opened the Indian Maritime University in Chennai with an outlay plan of Rs. 300 crores for the same.<sup>19</sup> This demonstrates the need for a fine balance between direct and indirect expenditure, which is essential for the successful implementation of any beneficial scheme.

### VIII. SOME CONCERNS

The social and economic goals aimed by the benefits given under the tonnage tax regime are being offset by certain factors. Some of these factors are the lower visibility of tax expenditures (which results in lesser tax scrutiny), ancillary tax burdens, lack of expertise in sector specific areas etc. These factors defeat the purpose of the social and indirect expenditure by the government.. Furthermore, Surrey argued that *"many tax incentives would be seen as inequitable, unfair or ineffective."*<sup>20</sup> Let us analyse these concerns with a few illustrative examples and case laws.

First and foremost, it is argued that Prof. Surrey permits a very narrow purview on tax policy. All through his arguments, he failed to recognise the fact that not all social or economic goals can be achieved through direct expenditure. He further failed to recognise that inequity can only be argued if the

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19. *Supra* note 10 at p.15.

20. Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and Rethinking of a Collective Identity*, 3 University of Pittsburg School of Law Working Papers (2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=567422](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=567422)



players are on an equal playing field in the first place. Let us return to tonnage tax to illustrate this. The shipping industry is a very cyclic industry involving huge initial investment costs and differences in operating costs for local and foreign players. In order to incentivize investments, some sort of government assistance is required. The desired goals of increase in tonnage, fleet capacity, training to officers etc can be achieved much more effectively through indirect expenditure by providing tax benefits. Furthermore, many of the new ships are getting registered outside India where the taxation system is both favourable and less burdensome.<sup>21</sup> The tax system for seamen on foreign voyages in foreign vessels and for those aboard Indian ships is also different.<sup>22</sup> In order to balance out these inequalities, indirect government expenditure and tax benefits for Indian companies are needed.

It is true that the benefits of the tonnage tax regime are being offset by introduction of certain taxes like service tax and dividend distribution tax. For example, the profits from sale of ships subjected to the minimum alternate tax (MAT) levied at 15%.<sup>23</sup> These concerns have been addressed by many other jurisdictions like South Africa.<sup>24</sup>

Since the government provides tax expenditure to support specific industries and companies, it is important to make sure that the intended benefits accrue only to the intended beneficiaries. The Courts have ruled that *“the question of applicability of tonnage tax regime, has necessarily to be decided by taking into consideration various aspects, including the ground realities as to the nature of activities and different other aspects.”*<sup>25</sup>

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21. Shipping Industry Demands Tonnage Tax System, Project Manager, (Mar. 25,2011), <http://www.projectsmonitor.com/detailnews.asp?newsid=6935>

22. *Id.*

23. Praveen Kumar Singh, More Income in Tonnage Tax net to help Shipping Companies sail through, (Mar. 25,2011), <http://www.financialexpress.com/news/more-incomes-in-tonnage-tax-net-to-help-shipping-cos-sail-through/578229/0>

24. Discussion Document on South African Tonnage Tax Proposal, [www.treasury.gov.za/.../Tonnage%20tax%20discussion.pdf](http://www.treasury.gov.za/.../Tonnage%20tax%20discussion.pdf)

25. *South India Corp. Ltd. v. Addl CIT* [2009]180TAXMAN319(Ker)(Ind.); Also on similar lines is the reasoning in *Addl. CIT v. EPSOM Shipping (I) (P.) Ltd.* (2009) 121 TTJ (Mum) 186(Ind.)

## IX. CONCLUSION

It is argued in this paper that the tonnage tax regime fulfills the intended objective of providing impetus to the shipping industry. The indirect government tax expenditure seeks to build an internal mechanism, which would support the industry, rather than a one off direct expenditure which would not be sustainable. Over a long term period, the loss/expenditure incurred by the government by charging a lesser tax would be compensated by the increase in tax base, and also be justified by the social and economic development of this particular sector.

It is true that there are certain concerns regarding ancillary taxes and the increased burden upon the ship owners. However, these concerns can be addressed by a systematic review of the tax liability of the shipping sector, and bring in necessary amendments. The same has been done before, and there is no reason why this issue cannot be sorted out and the concerns addressed satisfactorily.

The concerns addressed by Prof. Surrey, with regards the viability of tax expenditures, atleast in regards with tonnage tax in India, can rest in peace.

# THE ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL, 2010 – A BARRIER TO HOMOSEXUAL PARENTHOOD

Arunima and Karishma Muravne\*

## I. INTRODUCTION

The right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy... Disapproval of homosexuality cannot justify invading the houses, hearts and minds of citizens who choose to live their lives differently.<sup>1</sup>

-Justice Blackmun

Decriminalisation of consensual sexual acts between adults in India was a significant and progressive leap taken by the High Court of Delhi in the *Naz Foundation v. Government of NCT of Delhi*<sup>2</sup>(hereinafter *Naz Foundation* case). The court also established the right of homosexuals to full personhood.<sup>3</sup> "Personhood" is the sense of being an individual. It encompasses self-development, dignity, and humanity. Personhood is developed through introspection, relationships with others, and through one's interactions with the State.<sup>4</sup> Thus, for complete attainment of homosexual personhood, it is imperative that the focus now be shifted to rights that need to be afforded to homosexuals in order to enable them to lead a normal life. One of such rights is the right to reproduce. Since same-sex couples cannot reproduce by heterosexual means, they are left with no options but to employ assisted reproductive technologies to have children genetically related to them. However, the Assisted Reproductive Technologies (Regulation) Bill, 2010<sup>5</sup> imposes legal hurdles disabling homosexual couples in India from resorting to assisted reproductive technologies.

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1. *Bowers v. Hardwick*, 106 S.Ct. 2841, 2853 (1986).

2. 94 CrLJ (2010) (Ind.).

3. *Id.* at para 48.

4. Maya Grosz, *To Have and to Hold: Property and State Regulation of Sexuality and Marriage*, 24 N.Y.U. REV. L. & SOC. CHANGE 235, 263 (1998).

Assisted Reproductive Technologies (ARTs) are non-coital methods of having children including in-vitro fertilisation, artificial insemination and surrogacy. In-vitro fertilisation of embryos refers to embryos whose fertilisation, or any other process by which the embryo was created, began outside the human body. Artificial insemination is the process by which sperm is placed into the reproductive tract of a female for the purpose of impregnating the female by using means other than sexual intercourse. The most common instance of non-coital procreation among female same-sex couples involves lesbian women who request artificial insemination with sperm obtained from donor friends or purchased from sperm banks. Surrogacy is an arrangement by which the child is borne by a woman outside the couple. A commercial surrogate mother is one who is commissioned and paid to undertake the labour of pregnancy in order to produce a child that will be delivered to the commission parties who will raise the child as their own and will hold all the parental rights. A partial surrogate contributes the egg that becomes the child and so is genetically as well as gestationally the parent of the child. A full surrogate is not the genetic mother of the child she bears. For male same-sex couples, surrogacy is the only means of assisted reproduction to have a child. In some cases, the surrogate mother provides the egg which is fertilised with sperm obtained from either of the males. In other cases, egg is obtained from a donor and fertilised with sperm obtained from either of the partners and the zygote is implanted in the surrogate mother who will gestate the child.

This article analyzes the procreative liberty of gays and lesbians and their right to use assisted reproductive technologies to form families. It argues that all persons, regardless of sexual orientation or marital status, have the right to procreate and to use ARTs when necessary to achieve that goal. The article explains as to why and how barriers preventing access to assisted reproductive technologies by homosexuals should be removed and concludes by making suggestions regarding the same. Part II elucidates how Indian same-sex couples have not been given any rights to access ART as a “couple” under the Bill. Part III establishes the existence of a right to reproduce which

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5. MIN. OF HEALTH & FAMILY WELFARE, THE ASSOCIATED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL OF 2010.

6. *Id.* clause 32(1).

encompasses reproduction by means of assisted reproductive technologies thereby bringing assisted reproductive technologies within the scope of Article 21 of the Indian Constitution. Part IV explains the discriminatory consequence of the Bill and argues that all persons, irrespective of their sexual orientation, should be permitted the use of ART. Lastly, Part V examines the constitutional validity of such provisions through the “strict scrutiny” analysis. It proves that concerns such as absence of legal recognition of same-sex couples in India or the quality of gay parenting are irrational and do not form a “compelling interest” on the part of the state to prevent same-sex couples from accessing assisted reproductive technology. PART VI examines laws of other countries which have given recognition to procreative liberty of homosexual couples through ARTs.

## **II. THE ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL, 2010 AND SAME-SEX COUPLES**

The Assisted Reproductive Technology (Regulation) Bill 2010 allows married couples, individuals as well as unmarried couples to have access to various methods of assisted reproductive technologies in India<sup>6</sup>. However, despite its liberal approach, homosexual couples in India have been barred from using ARTs.

“Unmarried Couple”, according to the Bill, means two persons of marriageable age, living together with mutual consent but without getting married, in a relationship that is legal in the country or countries of which they are citizens.<sup>7</sup> By ruling that section 377 of the Indian Penal Code was violative of Articles 14, 15 and 21 of the Indian Constitution, the High Court of Delhi in *Naz Foundation* case, decriminalised consensual sexual acts in India<sup>8</sup>. The decision relied on foreign references, not only from the United States of America and the United Kingdom, but also from Hong Kong, Fiji and Nepal destroying the notion that “gay rights” are a Western concept. However, homosexual relationships are yet to be legalised in India and thus, Indian same-sex couples are excluded from the ambit of an “unmarried couple” as defined

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7. *Id.* clause 2(v).

8. *Naz Foundation v. Government of NCT of Delhi*, 94 CriLJ (2010) (Ind.), para 132.

9. The Associated Reproductive Technologies (Regulation) Bill, clause 34(2) (2010).

by the ART Bill.

The Bill also allows an individual to opt for assisted reproductive technology methods giving him or her complete parentage rights over the commissioned child. It might be contended that by permitting individuals to have access to ART, the bill gives same-sex couples in India an opportunity to be parents. If a same-sex couple in India- X and Y- decides to have a child by means of ART and X, as an “individual” under the ART Bill, commissions a child, only X shall be recognised as the legal parent<sup>9</sup> and Y would have no legal rights over the child. Y may be unable to consent to medical care, meet with school officials, or represent the child’s interests to various government agencies. Most importantly, Y’s position is most perilous if the relationship between them ends. Y is legally unrelated to the child and has no right to any continuing contact with the child. The relationship between the two may end because they decide to separate. If they do so, they may be unable to agree on dividing childcare responsibilities. When they litigate for custody, X begins with an overwhelming advantage over Y<sup>10</sup>. This is because of the general rule that a court prefers a parent or a natural guardian<sup>11</sup> to a non-parent in a custody matter.

In certain States of America<sup>12</sup>, “second parent adoption” is enabled whereby a legally recognized parent’s committed partner may adopt and become a co-parent of the child.<sup>13</sup> It is the legal recognition of the parental relationship between a homosexual and her partner’s biological or adopted child, without termination of the partner’s already legally recognized parental rights. Second parent adoption does not require the legal parent to be married to the party seeking to adopt the child<sup>14</sup>. Thus, by second-parent adoption, both partners of a same sex couple, who cannot marry in most jurisdictions, can be legal parents of the child.

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10. Julie Shapiro, *A Lesbian-Centered Critique Of Second-Parent Adoptions*, 14 BERKELEY WOMEN’S L.J 17, 23 (1999).

11. Hindu Minority and Guardianship Act, § 6 (1956).

12. California, Connecticut, D.C., Illinois, Massachusetts, New Jersey, New York, Pennsylvania and Vermont.

13. Richard F. Storrow, *Rescuing Children From The Marriage Movement: The Case Against Marital Status Discrimination In Adoption And Assisted Reproduction*, 39 U C DAVIS L REV 305, 339 (2006).

14. *Id.* at 340.

15. Hindu Adoption and Maintenance Act, § 12 (1956).

However, for Indian same-sex couples, adoption by the other partner is not a plausible option. For example, if both the partners are Hindus, according to the Hindu Adoption and Maintenance Act, 1956 the child severs all his ties in the family of his birth which are replaced by those created in the adoptive family.<sup>15</sup> Since, same sex couples in India are not married or otherwise in any form of legal relationship, the effect of adoption by one partner would not create ties between the child and the other partner. There are no statutory provisions for a second parent adoption in India.

Thus the Bill does not allow same-sex couples in India to have a child of whom both partners are legal parents. It has been said that the Bill is liberal in the sense that it allows homosexuals to have children by means of ART as individuals and leaves further scope for same-sex couples to have children by ART once their relationship is legalised in India<sup>16</sup>. Yet, at issue is a denial of a right rather than a mere delay in when the right can be exercised, and thus “critical examination” is required.<sup>17</sup>

### III. IS THERE A RIGHT TO ASSISTED REPRODUCTIVE TECHNOLOGIES?

To establish a right to assisted reproductive technologies, it needs to be determined if there exists a “right to reproduce”- at all-and whether such a right encompasses the assistance of new technologies.

The right to reproduce can be regarded as a moral right as well as a legal right.<sup>18</sup> John Robertson, deriving the moral right from dignity, states that the decision about reproduction best captures “the importance of procreative liberty” since “control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one’s life”. One’s self-definition, he explains, can be affected in the most basic sense when deprived of the ability to avoid reproduction, impacting upon one’s

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16. Satya Prakash, Surrogacy not for married couples only: Draft law, (Last visited Dec.25, 2010) <http://www.hindustantimes.com/Surrogacy-not-for-married-couples-only-Draft-law/Article1-560762.aspx>

17. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

18. Marleen Eijkholt, *The Right To Found A Family As A Stillborn Right To Procreate?*, 18 MED L. REV. 127, 129 (2010).

19. Nicolette Priaux, *Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters*, 16 MED L. REV 169, 174 (2008).



“psychological and social identity and one’s social and moral responsibilities”. Further, a disability to reproduce, Robertson remarks, “prevents one from an experience that is central to individual identity and meaning in life”, and its denial, whether through infertility or external restriction, “is experienced as a great loss”<sup>19</sup>. As, Roger Chin puts it, it seems extreme to question the choice of any two people to have a child.<sup>20</sup>

Legally, on the other hand, the right to reproduce traditionally finds its origin in the right to found a family. The Universal Declaration of Human Rights (UDHR), 1948 and the International Covenant on Civil and Political Rights (ICCPR), 1976 by Article 16 and Article 23(2) respectively, gives “men and women of full age” the right to found a family.

Scholars may contend that the draftsmen of the UDHR or ICCPR never intended to include families of same-sex couples within the meaning of “family” as provided under these articles. However, such an argument is refutable and non conclusive since the scope of various provisions have been enlarged according to changing times and development of new technologies. Further, political, social and economic changes might bring about recognition of new rights and the law to meet social demands.<sup>21</sup>

The House of Lords, in *Fitzpatrick v Sterling Housing Association Ltd.*<sup>22</sup>, stating that the concept of family had undergone a change, both in the United Kingdom and overseas, held as follows:

Social groupings have come to take a number of different forms. The form of the single parent family has been long recognised. A more open acceptance of differences in sexuality allows a greater recognition of the possibility of domestic groupings of partners of the same sex. The formal bond of marriage is now far from being a significant criterion for the existence of a family unit. While it remains as a particular formalisation of the relationship between heterosexual couples, family units may now be

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20. Roger J. Chin, *Assisted Reproductive Technologies Legal Issues In Procreation*, 8 LOY CONSUMER L. REP 190, 229 (1996).

21. Unni Krishnan & Ors. v State of Andhra Pradesh & Ors., AIR 1993 SC 2178 (Ind.), para 21.

22. 1 A.C. 27 (2001).

23. *Id.* at 52.

24. Naz Foundation v. Government of NCT of Delhi, 94 CriLJ (2010) (Ind.) para

recognised to exist both where the principal members are in a heterosexual relationship and where they are in a homosexual or lesbian relationship.<sup>23</sup>

The right to found a family has also been laid down by the Yogyakarta Principles<sup>24</sup> on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity. Principle 24 clearly states that every person has a right to found a family irrespective of his or her sexual orientation or gender identity and that no family should be subjected to discrimination based on the sexual orientation of its members.<sup>25</sup>

Thus, keeping in view the changes in societal patterns, families of same-sex couples should be read within the scope of “family” as provided in the UDHR and ICCPR. Impliedly, same-sex couples, as per the two conventions, have a right to found a family which includes the right to procreate.

In the contemporary scenario, however, right to reproduce is encompassed within the right of privacy—a facet of Article 21 of the Indian Constitution.<sup>26</sup> Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.<sup>27</sup> In *R. Rajagopal v State of T.N.*<sup>28</sup>, the Supreme Court held the right to privacy is “the right to be left alone”. The two-judge bench stated that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among many other matters.<sup>29</sup> Construing this right to be left alone in matters of procreation, state’s interference or restrictions on procreation would be a direct encroachment on one’s privacy.

Further establishing this principle, the High Court of Andhra Pradesh in *B.K. Parthasarathi v State of AP*<sup>30</sup> held that there is a right

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43 (discussed *Yogyakarta Principles*).

25. THE YOGYAKARTA PRINCIPLES, <http://www.yogyakartaprinciples.org/> (Dec. 22, 2010).

26. *Kharak Singh v. State of UP*, AIR 1963 SC 1295 (Ind.).

27. *Naz Foundation v. Government of NCT of Delhi*, 2010 CriLJ 94 (Ind.) para. 40 (Referred Article 12 of UDHR; Article 17 of ICCPR).

28. AIR 1995 SC 264 (Ind.).

29. *Id.* at para. 28.

30. AIR 2000 AP 156 (Ind.).

31. *Id.* at para. 15.

to make a decision about reproduction and such a right is very personal on the part of every man or woman. The court further proceeded to state that such a right “includes the right not to produce”<sup>31</sup>. The use of “includes” by the court brings forth an obvious implication that the decision as to reproduction could be negative as well as an affirmative. Thus the High Court of Andhra Pradesh expressly established the right of “reproductive autonomy” and held that it was a part of right to privacy.<sup>32</sup>

The High Court of Andhra Pradesh, in the judgement, concurred with the right to reproductive autonomy as established in America through a line of cases, though mainly in dicta. In *T. Skinner v State of Oklahoma*<sup>33</sup>, the US Supreme Court characterised the right to reproduce as “one of the basic civil rights of man”<sup>34</sup>. Further, by striking down a law that regulated the distribution of contraceptives because it discriminated between married and single persons, the Supreme Court of United States in *Eisenstadt v Baird*<sup>35</sup> established a fundamental right to “bear or beget a child”<sup>36</sup>.

The next question that follows is whether this right to reproductive autonomy implies a right to reproduce with the help of various reproductive technologies or does the use of a doctor, Petri dish or other technologies in the process of reproduction render it any less of a right? An act of procreation refers to a voluntary act taken by an individual, that is either one of the two most proximate causes of the conception of a future person or persons, with such person or persons eventually being born. A couple that enters into a surrogacy contract and bears no biological relationship to the resulting child, but whose acts might be considered the proximate cause of its conception and birth, has arguably procreated. The relevant consideration is whether a person or persons have voluntarily acted to cause the creation of another

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32. *Id.* at para 14.

33. 316 U.S. 535 (1942).

34. *Id.* at 541.

35. 405 U.S. 438 (1972).

36. *Id.* at 453.

37. Carter J. Dillard, *Rethinking The Procreative Right*, 10 YALE HUM RTS & DEV L. J. 1, 9 (2001).

38. John A. Robertson, *Genetic Selection Of Offspring characteristics*, 76 B U L REV 421, 426 (1996).

39. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

40. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

being, and those actions have resulted in the birth of a child.<sup>37</sup>

Thus, if the Constitution protects coital reproduction from state interference, there are strong grounds for concluding that it would protect non-coital techniques involving the couple's own gametes to the same extent as their efforts to reproduce coitally.<sup>38</sup>

Moreover, the courts have protected the right to use contraceptives<sup>39</sup> and the right to abortion<sup>40</sup> as a part of the right to reproductive autonomy. If the courts have sheltered the right not to produce a child by employment of technologies that are not natural, it would be irrational to state that the right to bear a child extends to only fertile couples and by employment of coital means and does not include the right to assisted reproductive technologies. Applying a similar logic, the district court of Illinois, in *Lifchez v. Hartigan*<sup>41</sup>, held that "it takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."<sup>42</sup>

Thus, it would not be unwarranted to construe that the right to reproduce includes the right to assisted reproductive technology. Since the right to reproductive autonomy is a part of the right to privacy- an important facet of Article 21 of the Constitution- it can be inferred, by the doctrine of implied Fundamental Rights<sup>43</sup>, that this right to assisted reproductive technologies is a fundamental right in itself.

#### IV. NON-DISCRIMINATORY ANALYSIS

Article 14 of the Indian Constitution guarantees to Indian citizens "equal protection of laws" and Article 15 prohibits the

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41. 735 F Supp 1361 (N.D. Illinois 1990).

42. *Id.* at 1377.

43. PROF. M P JAIN, INDIAN CONSTITUTIONAL LAW 833 (LexisNexis Butterworths Wadhwa 2008).

44. The Equal Rights Trust, Declaration on Principles of Equity, 2008 (Jan.31,2011), <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20cropped%2016%20Oct%20dimitrina%20comment.pdf>

45. *Naz Foundation v. Government of NCT of Delhi*, 2010 CriLJ 94 (Ind.).

46. *Id.* at para 104.

State from discriminating between individuals “on grounds of religion, race, caste, sex, place of birth or any of them.”

Indirect discrimination occurs when a provision puts persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons.<sup>44</sup> The path breaking *Naz Foundation*<sup>45</sup> judgement established that discrimination against individuals on the ground of their sexual behaviour is analogous to “sex” under Article 15 and was thus prohibited.<sup>46</sup> Thus, when the Bill disadvantages same-sex couples as compared to heterosexual couples by allowing married heterosexuals to access ART and not granting access to the same to unmarried same-sex couples, it indirectly discriminates against homosexuals. The consequences of discrimination have been stated by John Gardener as followed:

Discrimination on the basis of our immutable status tends to deny us life. Its result is that our further choices are constrained not mainly by our own choices, but by the choices of others. Because these choices of others are based on our immutable status, our own choices can make no difference to them. .... And discrimination on the ground of fundamental choices can be wrongful by the same token. To lead an autonomous life we need an adequate range of valuable options throughout that life.... there are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice. Where there is discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable options from which they must choose more painful or burdensome than others.<sup>47</sup>

As explained above, since there exists a right to ARTs

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47. J. Gardner, *On the Ground of Her Sex(Uality)*, 18 OXFORD JOURNAL OF LEGAL STUDIES 167, 170-171 (1998).

48. Robertson, *Gay And Lesbian Access To Assisted Reproductive Technology*, 55 CASE W. RES. L REV. 323, 329 (2004).

49. *Id.* at 330.

50. Sara Cotton, et al, *Model Assisted Reproductive Technology Act*, 9 J GENDER RACE & JUST 55 (2005).

51. *Id.* at § 202.

when infertile, it is unlikely to limit such a right to persons who are married since a person's interest in reproduction exists independently of marriage<sup>48</sup> It cannot be denied that homosexuals too may have strong desires to have or care for offspring. They too have been brought up in families and in a society that identifies having and rearing children as an important source of meaning and fulfilment.<sup>49</sup> The Model Assisted Reproductive Technology Act<sup>50</sup> prohibits restrictions on grounds of sexual orientation as well.<sup>51</sup>

The State might argue that such discrimination is permitted since the possibility of same-sex couples having children is impossible and unnatural. If that might be the case, then the State cannot, in the case of married infertile heterosexuals, aid them in having children by ART. Since nature has not equipped such heterosexuals to reproduce, then the state should not interfere with nature by assisting them to do so.<sup>52</sup> However, if it does, there seems to be no comprehensible reason as to why it should not aid same-sex couples as well.

Moreover, certain countries like Belgium<sup>53</sup>, Canada<sup>54</sup>, Netherlands<sup>55</sup>, Iceland<sup>56</sup>, South Africa<sup>57</sup>, Spain<sup>58</sup>, Sweden<sup>59</sup> and certain states of America like Iowa, Columbia recognise same-sex marriages. Thus, same-sex couples who are citizens of such countries can legally opt for assisted reproductive technologies

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52. Robertson, Supra note 48 at 331.

53. Law of 30 January 2003 (Jan.7, 2011).

<http://www.senaat.be/www/?MIval=dossier&LEG=2&NR=1173&LANG=nl>

54. HOUSE OF COMMON, CIVIL MARRIAGE ACT, C-38, 2005.

55. Act on the Opening Up of Marriage, 2001 available at:

<http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=86> (last accessed on February 1, 2011)

56. Registered Partnership Law, 1996.

57. Civil Unions Bill, B 26B-2006.

58. Boletín Oficial del Estado, July 3, 2005.

59. Civilutskottets betänkande 2008/09:CU19.

60. The Assisted Reproductive Technology (Regulation) Bill, Clause 2 (v) (2010).

61. *Id.* Clause 2 (dd).

62. *Id.* Clause 32 (1).

63. Danish Registered Partnership Act No. 372 of 7 June 1989, substituted by Act No. 360 of 2 June 1999.

64. GOVT. OF U.K., CIVIL PARTNERSHIP ACT OF 2004.

65. Karner v. Austria, App No. 40016/98, Eur. Ct. H. R., July 24, 2003.

66. Life Partnerships Act, 2000.

67. Loi no. 99-944 du 15 Novembre 1999, Relative au Pacte Civil de Solidarité.

in India since the Bill allows a married couple<sup>60</sup> whose marriage is legal in the country or countries of which they are citizens to opt for ARTs. Another conspicuous feature of the Bill is that it allows “unmarried couples” constituting two persons, both of marriageable age, living together with mutual consent but without getting married, in a relationship that is legal in the country or countries of which they are citizens<sup>61</sup> to have children by means of assisted reproductive technologies<sup>62</sup>. Such legal relationships include “civil union”, registered partnership” and their likes in countries such as Denmark<sup>63</sup>, United Kingdom<sup>64</sup>, Austria<sup>65</sup>, Germany<sup>66</sup>, France<sup>67</sup>, Iceland<sup>68</sup> and the states of California, New Jersey in the United States. The consequence is clearly discriminatory and unwarranted against same-sex couples in India.

Consequently, the Bill not only discriminates between married heterosexuals and same-sex couples, but also discriminates between Indian same-sex couples and their counterparts in countries that have granted legal recognition to homosexual relationships. The reason for the same, however, is unconvincing.

## V. STRICT SCRUTINY ANALYSIS

As concluded above, the right to assisted reproductive technologies is a fundamental right within the meaning of Article 21 of the Indian Constitution. Also, the Constitution of India, by virtue of Article 14, guarantees to its citizens the fundamental right of “equality before the law” and “equal protection of the laws”. However, the Bill discriminates between Indian same-sex couples and married heterosexuals thereby classifying couples on the basis of their sexual orientation.

Where a classification burdens a fundamental interest, to determine its constitutional validity, it should be subject to strict scrutiny on equal protection grounds.<sup>69</sup> A measure that

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68. Registered Partnership Law, 1996.

69. Brooke Dianah Rodgers-Miller, *Adam And Steve And Eve: Why Sexuality Segregation In Assisted Reproduction In Virginia Is No Longer Acceptable*, 11 WM & MARY J. WOMEN & L. 293, 302 (2005).

70. Anuj Garg & Ors. v. Hotel Association of India & Ors., AIR 2008 SC 663 (Ind.) para. 45.

71. 316 U.S. 535 (1942).

72. *Id.* At page 541.



disadvantages a vulnerable group, defined on the basis of a characteristic that relates to personal autonomy must not be only tested on grounds of “reasonableness” but must be subject to strict scrutiny.<sup>70</sup>

The Strict Scrutiny Analysis was established in *T. Skinner v. State of Oklahoma*<sup>71</sup> which involved the validity of statute providing for the mandatory sterilization of some, but not other, three-time felons. Justice Douglas stated that the statute could survive the highly deferential rational basis review normally applied under the Equal Protection Clause of the American Constitution. Thus, the court held that rational basis review was inappropriate, because the challenged statute infringed upon the right to procreate—“one of the basic civil rights of man” that was “fundamental to the very existence and survival of the race.” In place of rational basis review, “strict scrutiny of the classification which a State makes in a sterilization law is essential,” the Court said, “lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”<sup>72</sup>

The Strict Scrutiny Analysis entails a two-pronged scrutiny:

- (a) The legislative interference should be justified in principle,
- (b) The same should be proportionate in measure.<sup>73</sup>

The scrutiny implies that “any classification which serves to penalize the exercise of [a fundamental constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”<sup>74</sup>

In the given case, the ART Bill 2010 must be subject to strict scrutiny analysis since it “disadvantages” same-sex couples by disallowing them to exercise their right to reproduce on grounds of their sexual orientation. Consequently there should be a “compelling interest”, justified in principle for same-couples in

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73. Anuj Garg & Ors. v. Hotel Association of India & Ors., AIR 2008 SC 663 (Ind.) para 48.

74. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

75. Surrogacy Still Not An Option For Indian Gay, Lesbian Couples, THE TIMES OF INDIA, (May.27, 2010), <http://timesofindia.indiatimes.com/india/Surrogacy-still-not-an-option-for-Indian-gay-lesbian-couples/articleshow/5978164.cms#ixzz0w2LTb9VL> (last accessed on January 5, 2011).

India to be disallowed access to ART.

### A. Absence of a Legal Relationship

Dr. Sharma, member secretary of the twelve member committee that drafted the ART Bill stated that though consensual sexual acts have been decriminalised in India, homosexual relationships has not been made legal. Thus, till gay and lesbian couples get legal status in India, they cannot avail surrogacy.<sup>75</sup>

According to the drafters, the fact that same-sex couples have not been given any legal recognition in India is the reason as to why they have not been given the right to ARTs. However, the statement is contradicting. There does not seem to be much litigation in India regarding same-sex marriage. In America, however, courts have often held that the reason why same-sex couples have been denied the right to marry is their disability to have children. The Court, in *Singer v Hara*<sup>76</sup>, rejected homosexual marriage on the ground that the state's recognition of marriage was based on its interest in procreation and it was apparent that no same-sex couples offered the possibility of the birth of children by their union.<sup>77</sup> One of the important features of marriage, courts have held, is that it provides a setting in which child-rearing can take place.<sup>78</sup>

Assisted Reproductive technologies allow same-sex couples to have children, furthering state's interest in marriage. ARTs, thus, bridges the gap between same-sex couples and homosexual couples partly. Hence, it seems ironical that legislators would deny same-sex couples the right to reproduce on grounds of absence of legal recognition of their relationship in the form of marriage or otherwise. Thus, a law limiting ARTs to married persons or to heterosexual persons should fail because it would treat the very same act-the use of a particular technology-differently based upon the marital status or sexual preference of the persons involved, with no real basis for the distinction other than societal disapproval or prejudice.<sup>79</sup>

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76. 11 Wash App 247 (1974).

77. *Id.* at 260.

78. Mark Strasser, *Loving Revisionism: On Restricting Marriage And Subverting The Constitution*, 51 HOW L. J. 75, 109 (2007).

79. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology And Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1476 (2008).

80. 821 N.E.2d 15 (2005).

The court, in *Morrison v Sadler*<sup>80</sup>, offered a better and more convincing answer to the requirement of legal recognition of same-sex couples. The court noted that:

There is a key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through [adoption] or assisted reproduction. Becoming a parent by using ‘artificial’ reproduction methods is frequently costly and time-consuming..... Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. ‘Natural’ procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.<sup>81</sup>

The court noted the state’s “clear interest in seeing that children are raised in stable environments” and then suggested that individuals opting for assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the ‘protections’ of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.<sup>82</sup> Thus, it seems unnecessary that there should be a requirement of legal recognition of same-sex couples for them to have an access to Assisted Reproductive Technologies and it is difficult to see any “compelling” interest of the State in this regard.

## **B. The Interests Of The Child**

The other possible State interest could be with regard to

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81. *Id.* at 24.

82. *Id.* At 24.

83. John A. Roberston, *Gay And Lesbian Access To Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 331 (2004).

84. David Orentlicher, *Beyond Cloning: Expanding Reproductive Options For Same-Sex Couples*, 66 BROOK. L. REV. 651, 666 (2001).

85. Lesbian & Gay Parenting, AMERICAN PSYCHOLOGICAL ASSOCIATION, (Jan.15, 2011), <http://www.apa.org/pi/lgbt/resources/parenting.aspx>

86. Flaks, Fischer, Masterpasqua, and Joseph (1995) reported that lesbian couples’ parenting awareness skills were stronger than those of heterosexual couples. Brewaeys and her colleagues (1997) likewise reported more

the quality of gay parenting as well as the sexual orientation of children of homosexuals. Usually opponents rest their opposition to gay and lesbian reproduction on concerns about the welfare of offsprings raised by gay or lesbian parents. In taking that position they assume, without actual evidence, that a gay or lesbian sexual orientation in parents is not good for children.<sup>83</sup> However, statistics regarding the same do not give rise to any concern.<sup>84</sup> The American Psychological Association has concluded that children raised by gay parents are not “disadvantaged in any significant respect relative to children of heterosexual parents.”<sup>85</sup> On the contrary, the results of some studies suggest that lesbian mothers’ and gay fathers’ parenting skills may be superior to those of matched heterosexual couples.<sup>86</sup> Also, a number of studies report that the great majority of offspring of both lesbian mothers and gay fathers described themselves as heterosexual.<sup>87</sup> Further, “the non-identity problem” characterised by Derek Parfit states that even if we allow for the sake of argument, that it would be preferable for all children to be reared in a heterosexual married setting; children born with the high likelihood of being raised outside that setting are not harmed by that fact alone because the children in question would not exist unless they were brought into the world by the gay or lesbian individuals or couples who rear them, they are not harmed simply because they have been born into what some have claimed to be less than optimal circumstances.<sup>88</sup> If a State seeks to restrict ARTs solely to those who prove themselves to be suitable parents and satisfy additional requirements, as in the adoption context, then these requirements must apply equally to all.<sup>89</sup>

While considering extending assisted reproductive technologies to a lesbian couple, former Prime Minister of Australia, John Howard, explained that “this issue primarily involves the fundamental right of a child within our society to

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favourable patterns of parent-child interaction among lesbian as compared to heterosexual parents.

87. Bailey, Bobrow, Wolfe, & Mickach, 1995; Bozett, 1980, 1987, 1989; Gottman, 1990; Golombok & Tasker, 1996; Green, 1978; Huggins, 1989; Miller, 1979; Paul, 1986; Rees, 1979; Tasker & Golombok, 1997.

88. Robertson, *supra* note 83 at 341.

89. Radhika Rao, *supra* note 79 at 177.

90. Ruth McNair, *Does the Convention on the Rights of the Child impose an obligation on states to allow gay and lesbian couples to adopt?*, 23(10) INT. J.L.P.F. 110,113 (2009).

have a reasonable expectation, other things being equal of the care and affection of both a mother and a father.” Such a notion seeks support from international conventions governing rights of child. However, as explained by Ruth McNair, this position is untenable under international law<sup>90</sup>. Article 18(1) of the United Nations Convention of the Rights of Child, 1989 provides that parents have primary responsibility for the upbringing and development of a child while article 27(2) states that parent(s) have the primary responsibility to secure the conditions of living necessary for a child’s development. However, there is nothing in the drafting history of the Convention to suggest that the term ‘parents’ was ever to be defined or confined to a man and woman. The Committee on Rights of Child has stated that it would seem hard to argue for a single notion of a family.<sup>91</sup>

As observed by Nevins J in the Canadian case of *Re K* <sup>92</sup>, it is the capacity of its members to ensure the “healthy development of a child through the provision of a stable, consistent, warm and responsive relationship between a child and his or her care giver” that is of central concern. Thus, extending the right of assisted reproductive technologies to same-sex couples would not, *prima facie*, be against the best interests of the child.

### C. Societal Norms

Social restrictions attached to same-sex parenting could also be seen as a potential reason. However, popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21 of the Indian Constitution.<sup>93</sup>

Therefore, it seems difficult to establish a “compelling state interest” in light of which same-sex couples could be regarded less deserving to have parental rights. The only limitation on homosexuals’ “ability to perform or contribute to the society” comes from the society itself: laws, moral traditions and general ignorance which prevent homosexuals from living openly,

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91. Committee on Rights of Child, Role of the Family in the Promotion of the Rights of the Child, (Jan.5, 2011). <http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommandationsfamily.pdf>

92. 15 RFL (4th) 129 para 143 (1995) (Canada).

93. *Naz Foundation v. Government of NCT of Delhi*, 2010 CriLJ 94 (Ind.) para 75.

94. Brooke Dianah Rodgers-Miller, *supra* note 56 at 301.

95. 117 P.3d 660.

96. *Id.* at p. 666.

raising families, and otherwise contributing to society.<sup>94</sup>

Hence, the ART Bill fails the strict scrutiny analysis so far as it denies same-sex couples in India the right to reproduce under Article 21 by means of Assisted Reproductive Technologies and is thus, unconstitutional.

## VI. INTERNATIONAL PERSPECTIVE

Several countries have extended parental rights to same-sex couples. The Supreme Court of California in *Elisa B. v Superior Court*<sup>95</sup>, acknowledged parental rights and obligations of both mothers in a same sex- relationship who had commissioned the child. The court could not perceive any reason as to why both parents of a child cannot be women.<sup>96</sup>

The United Kingdom specifically lays down provisions granting lesbian couples the right to assisted reproductive technologies. Section 42 of the Human Fertilisation and Embryology Act, 2008 gives a woman, who is in a “civil partnership” with another woman at the time the woman is being artificially inseminated, rights of a parent unless she did not consent to the artificial insemination. Further, under section 43, provision is made for lesbians who are not civil partners in United Kingdom to be legal parents of a child, if no man is treated as the father of the child and no woman is treated by virtue of the section 42 as a parent of the child.

Similar provisions have been codified under the Assisted Reproductive Treatment Act, 2008 of Victoria, Australia. The Act under section 3 of Part I defines partner to include a person who lives with another “as a couple on a genuine domestic basis, irrespective of gender”. Under section 13 of Part III, the woman’s female partner is presumed, for all purposes, to be a legal parent of any child born as a result of the pregnancy if she was the woman’s female partner when the woman underwent the procedure as a result of which she became pregnant and consented to the procedure as a result of which the woman became pregnant. Thus the Victorian Assisted Reproductive Treatment Act also extends benefits of ARTs to female same-sex couples living together.

Further, the Parliament of Canada, through the Assisted Human Reproduction Act, 2004, declared that persons who seek to undergo assisted reproduction procedures must not be

discriminated against, including discrimination on the basis of their sexual orientation or marital status.

## VII. CONCLUSION

The cause of homosexual behaviour is unknown and the question whether it is a choice is yet unanswered. It has been said to be a result of various factors including biological and psychological causes. Given to the fact that homosexuality is not a question of choice, it is difficult to comprehend any reasonable basis for the denial of assisted reproductive technologies to homosexual couples. Assuming that homosexuality was a question of choice, there still will be a lack of justification as to why homosexuals must be so discriminated, since human dignity recognises a person's autonomy of the private will and freedom of choice and action. Limits upon individual liberty and autonomy should be meted out with a measure of equality.

Consequently, same-sex couples should not be deprived of the human need of bonding that the Constitution has afforded to their heterosexual counterparts. Thus, the Assisted Reproductive Technologies (Regulation) Bill, 2010, because it classifies couples on the basis of sexual orientation, violates the constitutional guarantee of equality provided under Article 14 of the Indian Constitution. The Article has elucidated on the absence of a compelling state interest on part of the State to draw lines between homosexual and heterosexual couples in India with regard to assisted reproductive technology.

It is recommended that section 2(v) of the Bill be altered so as to include explicitly same-sex couples in India thereby permitting them to employ assisted reproductive technologies. Alternatively the Bill could provide for recognition of court decrees that allow a committed homosexual partner of the individual employing ARTs to be recognised as the legal parent of the child as well. Provisions enabling second parent adoption, as explained above, would also remove the barriers of homosexual couples to procreate. Such provisions will enable children to have, in the case of same-sex couples, two legal parents, thus furthering the interest of the State in child welfare. However, this should not be the be all and end all of it- consequent legislations should be passed recognising the relationship between same-sex couples, identifying family units where principal members are homosexuals and giving them rights similar to heterosexual couples.



# THE FUTURE OF HUMAN RIGHTS: RIGHT TO INTERNET

Varun Chablani\* and Alok Nayak\*\*

## I. INTRODUCTION

That the concept of human rights is an ever evolving subject has nowadays become a *cliché*. Every book ever published in the field of Human Rights has been emphasizing on the evolution and the floating nature of human rights. It is on this basis that the author has made certain predictions on what would amount to the human rights in the future. More important than predicting what would amount to human rights in the future, the need of the hour is to understand what has been the failure in implementation of the current human rights, even though there has been no lack in capital, manpower or knowhow. What would have probably failed in the implementation of the current human rights would be the lack of interest in receiving the rights, the difference in priorities in providing those rights or the lack of effective implementation.

Throughout history, human rights have evolved in two manners - using the nomenclature of Karl Marx, the bourgeoisie and the proletariat. In the opinion of the author, the rights received in violent forms have come through the proletariat. On the other hand, the rights received in more of a phased manner have come through the bourgeoisie. The predicted human right in this paper, ie. Right to Internet, would probably be arrived at from the latter.

## II. SARVA SHIKSHA ABHIYAN - FROM CONFIDENCE TO CONSTERNATION

On 28<sup>th</sup> November, 2001, the Indian Parliament passed the ninety third constitutional amendments; where the ministry of Human Resource Development had sanctioned a Rs. 10,000 crore project to provide free education for all children from ages six to fourteen.

When it had started off, there was unprecedented hope for

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change in the education of the country. Long before this move, the Supreme Court had declared that right to education was a fundamental right.<sup>1</sup> International declarations and covenants had seconded this claim.<sup>2</sup>

Somehow, the scheme has not reached its mark. This has been because of either lack of will, or administrative problems, gap between inputs and outputs and accountability to a higher authority. On the other hand, probably one of the most overlooked reasons for the failure of the right is that there is a lack of incentive at the ground level. The central government acts as the principal and the agent is the ground level teacher. The remuneration/incentive is low and it does not have a correlation on the performance of the teacher or the student which is quintessential to a principal agent relationship. The concept of piece based or time based performance appraisal system is absent.

At the end of this paper, the author will propose a *modus operandi* to prevent these problems when right to internet becomes a human right.

### III. RIGHT TO INTERNET: A FUNDAMENTAL HUMAN RIGHT

The concept of internet has increased manifold in the last ten years. The cyber world has grown from what is jargon-like known as Web1.0 to Web 2.0; the former being where the internet user is a passive user and the latter being that the internet user is as active as the website host. Not only have the users of internet increased exponentially, but also the uses of internet have grown beyond imagination. So much so that there is a section of society that cannot live without the internet. Having considered this, some governments have already taken initiative in enforcing mandatory internet. France and Finland are examples of the same. Costa Rica is the latest member of this club.<sup>3</sup> The debate has also been considered in the US Senate and the European Parliament.

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1. *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666.
  2. *A Fundamental Right*, THE HINDU, Apr. 1, 2010, [www.thehindu.com/education/article347392.ece](http://www.thehindu.com/education/article347392.ece).
  3. *Fundamental Right to Internet Access Declared*, CENTRAL AMERICAN DATA, Sep. 8, 2010, [http://en.centralamericadata.com/en/article/home/Fundamental\\_Right\\_to\\_Internet\\_Access\\_Declared](http://en.centralamericadata.com/en/article/home/Fundamental_Right_to_Internet_Access_Declared).

## Current Position of Right to Internet as A Fundamental Human Right

The first country to enforce right to internet as a fundamental human right was Finland. From July 2009, the Telecommunication companies of Finland have been directed by the Central Government to provide internet access at least 1 MBPS to all the citizens, especially the rural citizens. If that is not progressive enough, the country has setup a time table wherein the country seeks to increase the speed to at least 100 MBPS by 2015.<sup>4</sup> France, on the other hand, had legalised right to internet through a judicial decision in its constitutional court, the Conseil Constitutionnel. The decision came through challenging the validity of a controversial law called *Loi Hadopi*. Under the rule, pirates would be given three emailed warnings before having their access to the net cancelled.<sup>5</sup> Although the Constitutional Council agreed that theft of copyright material was a crime, it rendered the law unenforceable by saying that only a court had the authority to switch off a person's web connection.<sup>6</sup>

Both these countries, though very creative, have received a lot of criticisms. The obvious criticism is that with the exorbitant number of illegal downloads, whether the courts can afford to bar the internet connection of each illegal downloader? Further, in the words of Matt Asay, *"if the government assumes Internet access as a fundamental right, it ultimately is granting itself the fundamental right to tax its citizens to pay for it."*<sup>7</sup>

Another major criticism of this law is the unclear status of right to internet vis-a-vis online privacy, suspicious malware, data collection and third party information sharing. On similar lines, comes the concept of whether right to internet itself is a fundamental human right or just a means to achieve other fundamental human rights like right to speech, expression etc.

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4. Ahmed Saeed, *Digital Biz Fast Internet access becomes a legal right in Finland*, CNN INTERNATIONAL, Oct. 15, 2009, <http://edition.cnn.com/2009/TECH/10/15/finland.internet.rights/index.html>.

5. Sparks Ian, *Internet access is a fundamental human right, rules French Court*, DAILY MAIL, June 12, 2009, <http://www.dailymail.co.uk/news/worldnews/article-1192359/Internet-access-fundamental-human-right-rules-French-court.html?ITO=1490#ixzz0h31hKJBm>

6. *Id.*

7. Matt Asay, *Is Internet access a 'fundamental right'?*, THE OPEN ROAD, [http://news.cnet.com/8301-13505\\_3-10234555-16.html?tag=col1;post-4748](http://news.cnet.com/8301-13505_3-10234555-16.html?tag=col1;post-4748)

Probably the most relevant criticism of this law is the need and the priority of right to internet as a fundamental human right with respect to other human right violations, even in civilised countries like Finland and France.

The debate had reached the European Convention of Human Rights. Following the decision of the Constitutional Court, it had struck down right to internet as a fundamental human right. On the other hand, Viviane Reding of the Barosso Commission of the European Parliament believes that Right to Internet Access is a Fundamental Right. She quotes, *"The fourth element I would like to underline is the recognition of the right to Internet access. The new rules recognise explicitly that Internet access is a fundamental right such as the freedom of expression and the freedom to access information. The rules therefore provide that any measures taken regarding access to, or use of, services and applications must respect the fundamental rights and freedoms of natural persons, including the right to privacy, freedom of expression and access to information and education as well as due process."*<sup>8</sup>

On the other hand, international conventions, by and large, upon their strict interpretation, accept right to internet as a fundamental human right. For example,

*"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, and regardless of frontiers."*<sup>9</sup>

*"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*<sup>10</sup>

*"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of*

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8. Reding, Viviane, Vice President, Barosso Commission, European Commission, Justice, Fundamental Right and Citizenship, (Mar. 4, 2010), [http://ec.europa.eu/commission\\_2010-2014/reding/index\\_en.htm](http://ec.europa.eu/commission_2010-2014/reding/index_en.htm)

9. Art. 19, Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

10. Art. 19, International Covenant on Economic, Social and Cultural Rights, December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 3 January 1976).

11. Article 10, European Convention for the Protection of Human Rights and Fundamental Freedoms.

borders.”<sup>11</sup>

#### IV. RIGHT TO INTERNET AS A FUTURE HUMAN RIGHT IN INDIA

As discussed earlier, right to internet as a human right has basically two dimensions. The first one being that the government should stay away from a human right for it to be truly enjoyed. On the other hand, the second dimension propounds that the government should take keen steps in providing the human right to its citizens even if it is at the cost of taxes and regulations. The author believes that, while France, Finland etc. are exponents of the former, India is set in course to be the exponent of the latter. It is considerably easier for the government to provide the former, negative right as against providing the latter, positive right.

Further, the regulations of the negative right can be globally envisaged through a international network for internet regulation. As far as India is concerned, it need not bother about internet based regulations with relation to international law and the negative right to access internet. This is because, by the time India would have enough internet penetration comparable to Finland or France today, there would be an existing international mechanism with respect to the limits of freedom of speech on the internet vis-a-vis online piracy and other hazards. If not, India would have the opportunity to learn from the mistakes of the more developed countries in legitimising right to internet. On the other hand, India needs to concentrate on how to provide the right in the first place, even though there are more apparent and grave human right violations in the country.

To start with, we will have to clarify one major assumption. It is a common misconception that technology will enlarge the gap between the rich and the poor, the root cause of most human right violations. This is quite wrong. Technology can in fact give power to the people in helping themselves solve their own problems.<sup>12</sup> As quoted by Iqbal Qadir<sup>13</sup>, *“if citizens can learn to network, their voices will be heard and will be productive.”*<sup>14</sup> Through the micro-lending system pioneered by Mohammad Yunus, he had increased mobile phone penetration in Bangladesh manifold, thus reducing poverty. The best way that communication has helped increase

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12. Smith, Adam, The Wealth of Nations, Digireads.com. 2009.

13. Founder of GrameenPhone, Bangladesh.

14. TED Video, Oxford England, September, 2007.

the standard of living in Bangladesh is to empower people to foresee and avoid natural disasters like floods. This has also been supported by some economists.<sup>15</sup> Even if internet accessibility is not a fundamental right in India, the government should still pursue increasing internet penetration. Internet will also empower people in making their decisions.

The second misconception is that the government are the donors in addressing the second generation of human rights and the citizens are just passive recipients.<sup>16</sup> This is also wrong. The new methodology which the author proposes in achieving the human rights is to empower and incentivise the people to incorporate the human right. As compared to the Sarva Shiksha Abhiyan, usually the agencies/instrumentalities of the government do not have enough of an incentive to provide the human right to the people. For example, if a national legislation exists has a law where a prostitute is to be arrested, the policeman on ground level has more of an incentive to have sexual relations with the prostitute as against arresting her. On the other hand, if the policeman would have more incentives in arresting the prostitute, he would even probably go out of his way in order to arrest the prostitute.<sup>17</sup>

Lets Compare this example to online social networking. If a person is on a particular online social networking portal like Orkut or Facebook, there is no incentive for him if he is the only one in it. hence, he would invite others to join. Every additional member of the social networking portal would not only himself get benefited but would also be beneficial for the existing member who sends the invite. This concept is called, in the words of Adam L. Penenberg, a *Viral Loop*.<sup>18</sup> This concept does not need to apply

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15. The Economist, The Real Digital Divide, February 2006.

16. V. K. Parigi, *CGG Collected Working Papers: 2003 - Volume 1, Citizen Governance: Concept and Practice*, <http://www.cgg.gov.in/pdfs/WP-72-84.pdf>

17. Dubner, Stephen J., and Steven D. Levitt, *Super Freakonomics: Tales of Altruism, Terrorism, and Poorly Paid Prostitutes*, William Morrow 2009 at chapter 3.

18. Inspired from Penenberg, Adam L. *The Viral Loop, The Power of Pass-it-on*, First South Asian Edition, 2009, Sceptre.

19. Vincent, Susan, *Preserving Domesticity: Reading Tupperware in Women's Social, Domestic, and Economic Roles*, *Canadian Review of Sociology and Anthropology*, 40(2) (2003): 180-184, Available at 10.1111/j.1755-618X.2003.tb00242.x visited on 4th March, 2010.

20. Sangheet Verghese, *Reliance Infocomm's Marketing Strategy and its Impact in*

only for online products. As history has shown, the viral loop may apply for Tupperware Products<sup>19</sup>, Reliance Mobiles<sup>20</sup>, and, in this proposal, internet service provision.

Some city municipalities, especially in the United States, are proposing very expensive methods to create a *Hot Cities* wherein the whole city would be connected by wi-fi or a similar mode of internet service.<sup>21</sup> This is not only expensive, there would also be major administrative problems. A better alternative would be to let the people *pass the ball* in incentivising their fellow citizen to avail internet services. This does not undermine the role of the government. While it is acknowledged by the author that human rights can be claimed only from the State, it does not mean that the State would be the only provider of the rights. The State may just play the role of the initiator of the viral loop. To compare this with the growth of Facebook, the State may just play the role of the pioneer Harvard students who sent invites to everyone after Facebook became an open network.<sup>22</sup> This does not mean that the State would get into a loss. Quite the contrary, they may just sneak a profit through this venture in the following ways, even though that would probably not be their intention.

- The State can achieve the right for a fraction of the cost of the traditional right implementation mechanisms.
- The cost of installing, usage, upload-download, and bandwidth would substantially reduce over time.
- The State would also benefit from economy of scale.
- A Public-Private Partnership may be implemented for distribution of internet service.

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*the Indian Mobile Phone Telecommunication Scenario*, Media@LSE, <http://www.lse.ac.uk/collections/media@lse/pdf/Varghese%20paper%2031.01.06.PDF>

21. *First Wi-Fi City In America:Grand Haven goes Wireless*, PHYSORG.COM, Aug. 1, 2004, <http://www.physorg.com/news605.html>

22. FACEBOOK COMPANY TIMELINE, <http://www.facebook.com/press/info.php?timeline> (last visited march 4, 2010).



## V. CONCLUSION

After a thorough research on this new topic, the hypothesis put forth by the author partly falls. The author had predicted that it would be easier to enforce the right to internet as a human right as a negative right. The law has not matured enough to know what is the optimal amount of intervention that the state needs to follow for this right to prosper. This is because only two countries have acknowledges this right, and that too, only recently. The countries of France and Finland face a very interesting challenge wherein they will have to set the precedent to exercise optimal amount of State intervention with respect to right to internet. India here is at an advantage because by the time right to internet is recognized as a fundamental human right, either there would be an international framework for the countries to follow, or they would learn from the mistakes of countries like Finland and France. Hence, this hypothesis falls. On the other hand, it would probably be easier for a country like India to enforce the right as a positive, second generation right, even if it appears to fulfill the objective of first generation rights. Success stories of mobile penetration in India and Bangladesh and its positive effects thereof should prompt internet penetration also, whether it is sooner or later. Further, even if the State is only concentrating on fulfilling existing human right problems, it should still invest in internet penetration. This is because, as seen with mobile phone penetration, it would result in unintended consequences which would eventually help in implementing and upholding the current human right problems in the country. The author would like to sum up reiterating the point that traditional right implementation mechanisms do not work as well in a vast and developing country where there are a lot of administrative problems and red-tapism. Hence, providing the people themselves incentives in spreading a concept would not only become more economical, but also cost effective. The State would only need to play the role of a regulator of the citizens who would *pass the ball* and thus help right to internet access be achieves as a positive right.

# THE NATIONAL IDENTIFICATION AUTHORITY OF INDIA BILL, 2010 – WHATS YOUR NUMBER?

Harikrishna Pramod\*

## I. INTRODUCTION

The wheels of the future started turning on September 30, 2010 when Prime Minister Dr. Manmohan Singh distributed the first Adhaar numbers to ten villagers in Tembhli in Maharashtra. This “unique identification number” (Unique-ID) endeavour was first initiated during the NDA Government in 2003. However, due to privacy concerns among the residents, there was no progress. The UPA Government initiated the UID project after the events of 26<sup>th</sup> November, 2008 which expedited the setting up the Authority in 2009. Subsequently, in 2010, the National Identification Authority of India Bill was drafted to establish the National Identification Authority of India (hereinafter referred to as the “Authority”) and to regulate matters with regard to the functioning of the Authority. The primary purposes of the identity number include the obviating of requirement of multiple documentary proof, easy verification, facilitation of e-governance and helping welfare programmes reach intended beneficiaries.<sup>1</sup>

Chapter I of the Bill talks about the definitions and other preliminaries. Chapter II defines an Adhaar number, who can avail of it and the Authority’s role in issuing the number. Chapter III talks about the constitution of the Authority. Chapter IV talks about Grants, Funds, Accounts and Audit and Annual reports of the Authority. An Identity Review Committee is established under Chapter V of the Bill to review the identity information provided. Chapter VI prescribes the steps to be taken by the Authority for the protection of the Information. The penalties and offences are prescribed under Chapter VII. The various other miscellaneous provisions are provided for under Chapter VIII.

## II. CONSTITUTIONAL CONCERN – PRIVACY V. BENEFITS

*“The said right [to privacy] is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected*

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1. Government approves issue of unique identity (UID) number to all residents, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA (Nov. 10, 2008, 04:56 P.M.) <http://pib.nic.in/release/release.asp?relid=44711>.

*to give him rest, physical happiness, peace of mind and security.”<sup>2</sup>*

And thus, the Supreme Court of India upheld the “Right to Privacy”. The Right to Privacy; it is an essential part of a free life of an individual. It entitles him the right to keep his personal information from being publicised and known to the general public without his consent. An Adhaar number holder is faced with the same circumstance. The information he provides for availing of the number needs to be suitably and sufficiently protected from all illegal and mala fide entities so as to protect the information that is stored in the Data Repositories. The Government, if it may be said, has a fiduciary relationship with the Adhaar number holder to keep the information provided and to not disclose such information without the permission of the holder of such number.<sup>3</sup> The Bill mentions that *“the Authority shall take measures (including security safeguards) to ensure that the information in the possession or control of the Authority (including information stored in the Central Identities Data Repository) is secured and protected against any loss or unauthorised access or use or unauthorised disclosure thereof.”<sup>4</sup>*

The Bill specifies that the Adhaar number will be, subject to authentication, used as a proof of identity of the individual. This will involve many and almost all Government and State bodies using the Adhaar number as a parameter for proof of identity. The Legislature seemed to have deliberated and given adequate thought about including the consent for disclosure of information but giving due consideration that India has an illiteracy rate of 23.1% among men and 45.5% among women above the age of 15 years<sup>5</sup>, it is unreasonable to expect a written consent for disseminating the information from them and quite far-fetched to expect them to understand the reasons of sharing their personal information with any agency, Governmental or commercial.<sup>6</sup>

Clause 23(2)(k) of the Bill states “...sharing, in such manner as may be specified by regulations, the information of aadhaar

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2. Kharak Singh v. State of UP, AIR 1963 SC 1295.

3. Restatement (Third) of Agency § 8.01 (2006).

4. National Identification Authority of India Bill, § 30(2) (2010).

5. Monitoring ICPD Goals: Selected Indicators: State of the World Population Report 2009: Facing a Changing World: Women, Population and Climate (Nov. 18, 2009), [http://www.unfpa.org/swp/2009/en/pdf/EN\\_SOWP09\\_ICPD.pdf](http://www.unfpa.org/swp/2009/en/pdf/EN_SOWP09_ICPD.pdf).

6. The Federal Privacy Act, 5 U.S.C. § 552a(e)(3) (1974).

number holders, with their written consent, with such agencies engaged in delivery of public benefits and public services as the Authority may by order direct;" The whole purpose of this Bill being delivery of 'public benefits' and 'public services', these two terms are not defined or specified comprehensively anywhere in the Bill. This gives the Authority complete discretion as to what can be taken as benefits and services under the Act. Such collection of personal information without specifying purpose has been held unconstitutional in a few countries.<sup>7</sup>

The United States of America also faced a similar situation in which benefits were to be distributed to the citizens by means of a Social Security Number (hereinafter referred to as "SSN") which was given to all citizens. This number over the years was a subject to thousands of identity thefts and billions of dollars of money spent in rectifying the mistakes and damage caused by such thefts. The Congress then came up with The Federal Privacy Act of 1974 (hereinafter called the "Privacy Act"). This Act gave specific directions as to the usage and practices involved in collecting of information and furnishing of the SSN for various purposes. Exemption 6 of the Privacy Act "allows agencies to exempt from disclosure of information contained in 'personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'" Many courts in the US, on the basis of this exemption have interpreted it to include information involving the SSN as well as the number itself.<sup>8</sup> The Privacy Act, 1974 requires that if an entity is a local, state, or federal government agency, it cannot require an individual to submit his SSN unless it has received specific permission from Congress for the same.<sup>9</sup> The Bill does not mention any limitations or regulations for the exchange of information between the Authority and any public agency which might want access to such information.

The US courts, for the purpose of deciding whether a particular case involves invasion of privacy by disclosing private information such as SSN has formulated two tests, one

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7. Legfelsőbb Bíróságának (LB) [Constitutional Court] 1991.04.13 15-AB [http://www.uoou.cz/files/judik\\_hungarian\\_constitutional\\_court.pdf](http://www.uoou.cz/files/judik_hungarian_constitutional_court.pdf). (Hung.).

8. Greidinger v. Davis, 988 F.2d 1344, 1354 (1999) quoting I.B.E.W. Local No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988).

9. Flavio L. Komuves, *We've Got Your Number: An Overview Of Legislation And Decisions To Control The Use Of Social Security Numbers As Personal Identifiers*,

implemented by a majority of courts and the other a minority which is gaining popularity over the former steadily. The first test is called the Restatement's publicity test. The Minnesota Supreme Court in *Bodah v Lakeville Motor Express, Inc.*<sup>10</sup> while applying the publicity test stated that the test should consider not only the breadth of the disclosure but also the nature of the recipient and the nature of the information disclosed. According to the Restatement (Second) of Torts, publicity means that a private matter is made public when it is communicated "to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."

This definition provided in the Restatement has been liberally and strictly interpreted by the US Courts.<sup>11</sup> After a few judgements deciding that the dissemination of the information like the SSN is not a violation of the privacy of the individual since the number of people disclosed to, was not large enough<sup>12</sup>, there was a need for a new test which would provide more appropriate relief to the person affected by such violation.

It was in *Beaumont v. Brown*<sup>13</sup> that the court reasoned that "communication of embarrassing facts about an individual to a public not concerned with that individual and with whom the individual is not concerned" does not interfere with the plaintiff's right to privacy. Thus, the court stated that an actionable situation arose if the private facts reached a "particular public" whose knowledge of the private facts would be embarrassing to the plaintiff. Then, in *Beacon Journal Publishing Co. v. City of Akron*<sup>14</sup>, the Ohio Supreme Court held that the "high potential for fraud and victimization caused by the unchecked release of city employee SSNs outweigh[ed] the minimal information about the government processes gained from disclosure of that information." In *Greidinger v. Davis*,<sup>15</sup> the plaintiff was prevented from voting for nondisclosure of his SSN. This move was challenged in the Virginia Court. The court, on hearing the matter, concluded

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16 J. MARSHALL J. COMPUTER & INFO. L. 529, 549 (1998).

10. 663 N.W.2D 550 (Minn. 2003).

11. *In re Crawford*, 194 F.3d 954 (9th Cir. 1999).

12. *Id.* at 960.

13. *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. 1977).

14. 640 N.E.2d 164 (Ohio 1994).

15. 988 F.2d 1344, 1354 (1999).

that egregious harm “can be inflicted from the disclosure of a SSN” and that Greidinger’s right to vote was substantially and unconstitutionally burdened because Virginia’s statutes permitted public disclosure of SSNs.<sup>16</sup>

The information collected in the process of issuing Adhaar numbers is at the disposal of the Authority. Though the Bill specifies that the person’s consent is required for disseminating information collected, the consequences of such disclosure might not be completely comprehended by many residents, mainly the illiterate. In such cases, the remedy available for such residents needs to be clear and the courts need a principle on the basis of which they can rule in favour of such affected residents. The Restatement publicity test and the “special relationship” and “particular public” test are apt for such a situation, at least for the time being in the Indian context.

The “particular public” or “special relationship” test is more applicable in the current scenario. This test provides for the rightful cause of action in the case of a violation of privacy of an individual.

The Indian Government should make amendments to the Bill to incorporate the provisions of the Privacy Act in it for the protection of the privacy of the citizens. This is necessary since sensitive information being collected should be protected and adequate measures and remedies for the protection and violation of the same respectively, ought to be drafted and passed.

### **III. MISSION CREEP: A LURKING FEAR**

Mission Creep refers to the expansion of a project beyond its original goals after initial successes. The SSN in the US is a perfect example of this. The number was introduced in 1936 by the Social Security Act whose purpose was stated as follows:

“[t]o provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws;

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16. *Id.* at 1346.

to establish a Social Security Board; to raise revenue; and for other purposes.”

The politicians at the time of the introduction of the Act emphasised on the point that the SSN would not be used as an identifier in the State or Federal structure. But this eventually happened in 1943 when President Roosevelt signed an Executive Order making the SSN a personal identifier to meet the national identification system.<sup>17</sup> The major step in the “creep” was when the Department of Defence stopped issuing serial numbers and shifted to SSN.<sup>18</sup> As the need for a national identifier for American citizens evolved with information and technology, the SSN was the logical choice because it was already in place. It is unlikely that such a system would have been adopted had anyone foreseen the creation of the Internet, the relative ease of obtaining private information over the Internet, and the potential damage it could have to an individual.<sup>19</sup> Thus, the “mission” of the SSN has “crept” from its original purpose as a Social Security benefit account number to a public and private sector tool for identification.<sup>20</sup>

So what if the function of one entity has crept into another dimension? The answer to this is the current scenario in the US where, with a SSN and a name, anyone can access accurate details about a subject profile including financial information, driving history, medical records, public records that identify number of children, marriage, birth and death certificates, political affiliation, business and social networks and buying behaviour.<sup>21</sup> Such information will scandalize and threaten to crack the foundations

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17. History, *FAQs – Frequently Asked Questions*, SOCIAL SECURITY, THE OFFICIAL WEBSITE OF THE U.S. SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/history/hfaq.html> (last visited Jan. 14, 2011).

18. *Id.*

19. Rick S. Lear & Jefferson D. Reynolds, *Your Social Security Number Or Your Life: Disclosure of Personal Identification Information by Military Personnel and The Compromise of Privacy and National Security*, B.U. INT’L. L. J. 140, 144-145 (2003).

20. Geoffrey D. Kravitz, *Real Id: The Devil You Don’t Know*, 3 HARV. L. & POL’Y REV. 431, 443-444 (2009).

21. William H. Minor, *Identity Cards and Databases in Health Care: The Need for Federal Privacy Protections*, 28 COLUM. J. L. & SOC. PROBS. 254, 279-81 (1995); also see Susan E. Gindin, *Lost And Found in Cyberspace: Informational Privacy in The Age of the Internet*, 34 SAN DIEGO L. REV. 1153, 1173 (1997); Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight For Control Of Personal Information*, 74 WASH L. REV. 1033, 1033-1034 & n.2 (1999).



of trust developed between the consumers and the commercial agencies which bona fide collect such information. The “creep” in the US has been severe with identity thefts, data phishing and stalking, both physically and virtually being reported increasingly. The Federal Trade Commission in 2000 conducted a survey in which they reported 28,000 cases of identity theft.<sup>22</sup> After just seven years, the number had increased tenfold with more than 258,000 cases being reported.<sup>23</sup> Since most identity theft cases are never reported and some not even discovered, the actual number might be anywhere around ten million annually.<sup>24</sup>

The UIDAI Bill is ambiguous in relation to its purpose and object since it does not mention the benefits to be distributed to the card holders. The non-specific approach of the Bill leaves a lot to the discretion of the Authority to identify “benefits and services”<sup>25</sup> and could end up in unrestricted use of the “Adhaar number” leading to no check and balance with respect to the power and extent of power of the Authority. The Bill specifies that the number can be used for identification purposes subject to authentication.<sup>26</sup> But such purpose for the identification is nowhere mentioned in the Preamble of the Bill. This creates a situation where the extent of the Bill is already “creeping” into the actual purpose of the Bill. It is a valid and dormant fear that the Adhaar number will follow the footsteps of the SSN.

#### IV. PENAL PROVISIONS

The Bill’s Chapter of Offences prescribes certain penalties for the unauthorised disclosure of information, unauthorised access to the Central Identities Data Repositories. The Bill however, specifies penalties only for gaining unauthorised access to the

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22. *Identity Theft Complaint Data*, FEDERAL TRADE COMMISSION: PROTECTING AMERICA’S CONSUMERS (Jan. to Dec. 2000) [http://www.ftc.gov/bcp/workshops/idtheft/archives\\_2000.pdf](http://www.ftc.gov/bcp/workshops/idtheft/archives_2000.pdf)

23. *Consumer Fraud and Identity Theft Complaint Data*, TRADE COMMISSION: PROTECTING AMERICA’S CONSUMERS (Jan. to Dec. 2007) <http://www.consumer.gov/sentinel/pubs/Top10Fraud2007.pdf>

24. *How To Protect Your Good Name From Identity Theft*, FEDERAL BUREAU OF INVESTIGATION (Oct. 20, 2004) <http://www.fbi.gov/page2/oct04/preventidt102104.htm>; see also Neal Walters & George Gaberlavage, *Protecting Social Security Numbers From Identity Theft*, AARP, (Sept. 2005), [http://www.aarp.org/research/fraudsscams/fraud/fs122\\_id\\_theft.html](http://www.aarp.org/research/fraudsscams/fraud/fs122_id_theft.html)

25. National Identification Authority of India Bill, § 23(2) (h), (2010).

26. National Identification Authority of India Bill, § 4(3), (2010).

Repositories. Since the Bill gives the power to the Authority to appoint Registrars and other enrolling agencies for the purposes of enrolment, a question arises as to why there are no penalties for unauthorised access to the database of these enrolling agencies and Registrars. There are no guidelines as to the manner in which the data collected must be disposed off after entering into the Data Repository. So, people who gain access to the Registrars' databases rather than the Central Repository go scot-free.

The IT Act of 2000 provides for declaring of certain computer server systems, networks as "protected data systems".<sup>27</sup> The penalty imposed for unauthorised access to these systems is a prison term of up to ten years. However, the Bill provides a reduced term of only three years for the offence. Though the Bill is an independent legislation dealing with identification numbers, there seems to be no reason for the deviation from the existing law in the IT Act.

The Bill specifically mentions that no Court can take cognizance of any matter unless a complaint made by the Authority or any person authorised by it is presented before it. It bars the *locus standi* of individuals to approach the Court in case they have suffered losses. The Bill lacks a suitable redressal mechanism since it makes the Authority the sole judge as to whether a matter must be proceeded with or not, making it an encroachment into the powers of the Judiciary thereby violating basic Administrative Law principles.

The Bill provides for necessary change in the information provided by the Adhaar number holder. The Authority in such cases will look into the information and upon satisfaction of the accuracy of information, will make the necessary changes in its Repository. But the Bill nowhere presents a remedy for any consequential damage caused due to the Authority not accepting the information provided or due to delay in such acceptance. The Privacy Act of the USA allows individuals to file suits against agencies in such situations where they refuse to alter the information provided on request.<sup>28</sup> The Privacy Act also imposes consequences on agencies if they fail to maintain records with

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27. The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India) § 70.

28. The Federal Privacy Act, 5 U.S.C. § 552a(g) (1)(A) (1974).

29. The Federal Privacy Act, 5 U.S.C. § 552a (g) (1) (C) (1974).

accuracy which leads to denial of benefits to individual.<sup>29</sup> The Bill however does not cast any responsibility or accountability on the Authority with regard to accuracy of the information.

## V. CONCLUSION

It is undoubted that the purpose of the Bill is *bona fide*, in the interests of national security and integration. At no cost should the whole project be abandoned. Realities of the situations in the country suffice in proving how far “social benefits” benefit the society.

However the Bill creates more problems than it solves. Population and illiteracy create massive barriers in the implementation of the Adhaar number project. Rather than attempting to handle the above barriers, the Bill only creates further ones concerning privacy and mission creep.

Besides these apprehensions, other concerns such as the penal provisions provided in the Bill which make the Authority unaccountable for any disclosure due to technical problems, the remission of the imprisonment for unauthorised access to protected data systems from ten years as mentioned in the IT Act, 2000 to three years without any explanation, the bar on process of suit without a complaint from the Authority or anyone authorised by it hamper effective implementation.

Therefore, it is imperative that the Bill be re-drafted adequately answering the above concerns for the actual distribution of benefits and services to the Adhaar number holders.

# YOU'VE GOT (MORE THAN JUST) MAIL: GMAIL'S EMAIL-CONTENT MONITORED ADVERTISING - TECHNOLOGICAL ADVANTAGES AND LEGAL CONCERNS

Ramyaa Veerabathran\*

## I. INTRODUCTION

According to Louis Gerstner, nowadays the technology issues are not technical- they are the compelling societal implications that counterbalance the undeniable advantages.<sup>1</sup> Technological innovation extends to every conceivable and sometimes unexpected realm of our lives. On a specific note, the technological innovation over the internet impacts our personal and professional lives remarkably. The pace with which advancements are happening in the field of technology is one which has never before been confronted by the legal system. In its quest to regulate and protect the myriad dimensions associated with and impacted by the internet, an attempt has been to avoid over-specificity and over-regulation to allow for dynamism in the legal response to problems thrown up by technological innovation.

Though the debate has largely taken place in the West, it has real implications and lessons for the Indian society and the legal system in place.

## II. TARGETED ADVERTIZING BY GMAIL

Gmail's launch in 2004 combining a mammoth 1 GB of free memory with Google's stellar search capabilities to manage inboxes raised a furor among the media and activist groups over the 'cost' incurred by users - in terms of violation of privacy by its targeted advertisements.<sup>2</sup>

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1. LOUIS GERSTNER, WHO SAYS ELEPHANTS CAN'T DANCE 272 (2004).

2. G. Yang, *Stop the Abuse of Gmail*, 14 DUKE L. & TECH. REV. 1, 3 (2005).

See also, M. A. Goldberg, *The Googling of Online Privacy: Gmail, search Engine Histories and the New Frontier of See also, Protecting Private Information on the Web*, 9(1) LEWIS & CLARK L. REV. 249, 251 (2005).

See also, K. A. Oyama, *E-mail Privacy after United States v. Councilman: Legislative Options for Amending ECPA*, 21 BERKELEY TECH. L. J. 499, 510 (2006).

Like most cloud computing services, Gmail is funded by revenue generated through advertizing.<sup>3</sup> The only difference with Gmail is that instead of paying to reach every user or network, the advertisers pay to target a specific category of users based on their interest in a particular subject.<sup>4</sup>

Targeted advertisement involves the display of advertisements that are contextually relevant to the current interests of the user.<sup>5</sup> Using the technology that powers Google's 'AdSense' program to scan emails received by the user, Gmail displays ads in the inbox that contextually correspond to certain keywords picked up from the scanned email in a completely automated process.<sup>6</sup>

### III. TECHNOLOGICAL ADVANTAGES

This targeted advertising technology revolutionized email services, facilitating unprecedented inbox sizes and unobtrusive yet effective advertizing in users' inboxes.

Apart from the value of free services, pertinent advertisements are a value addition to the user as well. Less obtrusive than the pop up and random ads found in other email services, targeted advertizing helps interested consumers find what they are looking for even when they are not actively looking for it. Gmail even attempts to be sensitive to the user's feelings, desisting from displaying ads with emails that contain catastrophic words or phrases, though there have been technical glitches with this endeavor.<sup>7</sup>

### IV. LEGAL CONCERNS

Legal concerns about targeted advertizing are born out of the nebulous relationship between utility, privacy and legality in

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3. W. J. Robison, *Cloud Computing: Free at what Cost? Cloud Computing Privacy under the Store Communications*, GEO. L. J. 1195, 1205 (2010).

4. *Id.* at 1206.

5. M. A. Goldberg, *The Googling of Online Privacy: Gmail, search Engine Histories and the New Frontier of See also, Protecting Private Information on the Web*, 9(1) LEWIS & CLARK L. REV. 249, 251 (2005).

6. *Ads in Gmail and your personal account, Gmail Help*, GMAIL: GOOGLE'S APPROACH TO E-MAIL, <http://mail.google.com/support/bin/answer.py?hl=en&answer=6603> (last visited on July 15, 2010).

7. N. Carlson, *Google's Worst Ads Ever* BUSINESS INSIDER (Aug. 20, 2009, 10:11 A.M.), <http://www.businessinsider.com/googles-worst-ads-ever-2009-8>.

8. *More on Gmail Privacy*, ABOUT GMAIL, <http://mail.google.com/mail/help/>

cyberspace.

## A. Utility and Consent

### 1. *The Hapless User Argument*

The legal relationship between Google and its users is defined by a click-wrap contract. In this contract, users agree to Gmail's Terms of use, Privacy Policy and Program Policy. Adequate notice regarding the advertizing system is prompted at many places.<sup>8</sup> Users therefore weigh the utility they get from Gmail against the perceived loss of privacy, if any, before they voluntarily choose to enter the contract.<sup>9</sup> The contract should be considered in context of the fact that Gmail is not a monopoly.

The legal position has changed from being prejudiced against standard form click-wrap contracts. Courts no longer treat users like unwilling or uninformed parties to the contract and do not hesitate to enforce these contracts against the users.<sup>10</sup>

## B. Privacy

The relevant conceptions of privacy in this respect are control over personal information and freedom from surveillance.<sup>11</sup> The real question is whether after deconstructing targeted advertizing from the surrounding discourse, does the scanning of emails violate privacy?

### 1. *Scanning is not 'reading'*

Why are we against information disclosure? Logically, because

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about\_privacy.html (last visited on July 14, 2010).

See also, *supra* text accompanying note 6.

See also, *Privacy Center*, GMAIL: GOOGLE'S APPROACH TO E-MAIL, <http://mail.google.com/mail/help/intl/en/privacy.html> (last visited on July 12, 2010).

9. ROBISON, *supra* note 3, at 1206.

10. ProCD v. Zeidenberg 86 F.3d 1447 (7th Cir., 1996).

See also, Hotmail Corp. v. Van Money Pie, No. 98-20064, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998), Feldman v. Google, Inc., 513 F.Supp.2d 229 (E. D. Pa. 2007), *In re* Real Networks Inc. Privacy Litigation, No. No. 00-1366, 2000 WL 631341, I. Lan Sys., Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 336 (D. Mass. 2002), Bragg v. Linden Research, Inc., 487 F.Supp.2d 593 (E. D. Pa. 2007), Caspi v. Microsoft LLC, 323 N.J. Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

11. See Whalen v. Roe 97 S. Ct. 869, 875-876 (1977).

See also, D. J. Solove, *Conceptualizing Privacy*, 90 (4) CALIF. L. REV. 1087, 1088 (2002).

of the undesirable social, financial, legal consequences that follow. In case of secure and automated scanning of words, none of these consequences follow. Therefore, the targeted advertisement by Gmail does not involve the 'reading' of email by any third party to the communication. Gmail guarantees that no email content or personally identifiable information is ever made available to advertisers.<sup>12</sup>

Concerns voiced have more to do with the potential effects of disclosure of information than with any apparent invasion just by the process of scanning. Even supposing that automated scanning of emails amounted to an invasion, it has already a part standard procedure for spam and virus protection.<sup>13</sup>

## *2. Is the issue with the means or the ends?*

The technology used by Gmail for targeted advertisements is the same as that used industry-wide to scan emails for spam and viruses.<sup>14</sup> Therefore, there is nothing inherently wrong with the means. The actual issue in the middle of all the rights and privacy talk is in the objective - marketing, which brings in huge revenues for Gmail.<sup>15</sup> Gmail has patented for this idea, blocking competitors from following suit.<sup>16</sup> However, the mere reason that Gmail profits from the process does not make it ethically reprehensible and legally wrong.

## *3. Privacy of Senders who are not Gmail users*

Another argument raised against Gmail is that since non-Gmail senders have not consented to their emails being scanned, Gmail violates their privacy.<sup>17</sup> This is a narrow argument. Once

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12. See Gmail Terms of Use, <http://gmail.google.com/gmailhelp/terms-of-use.html>, (last visited July 12, 2010).

13. YANG, *supra* note 2, at 5.

14. J. I. Miller, "Don't be Evil": Gmail's Relevant Text Advertisements violate Google's own Motto and your E-mail Privacy Rights, 33 HOFSTRA L. REV. 1607, 1610 (2004-2005).

See also, *supra* text accompanying note 6.

See also, Yang, *supra* note 2, at 14.

15. MILLER, *supra* note 14, at 1608.

16. US Patents Application number 20040059712.

17. YANG, *supra* note 2, at 4.

See also, K. T. Muth, Googlestroika: Privatizing Privacy, DUQ. L. REV. 337, 353 (2009).

See also, MILLER, *supra* note 14, at 1607.



the email enters the inbox of the Gmail user, the communication belongs to them in the eyes of law. The sender has no reasonable expectation of privacy in the email message once it reaches the recipient's address.<sup>18</sup> The advertisement is a part of services that the receiver of the mail (the Gmail user) chooses to avail of and does not violate the privacy or rights of the sender in any way.

#### 4. Law Enforcement Arm-twisting

Considering its potential to collect individual specific information and build profiles of users, Google could be forced by law enforcement agencies to use such capability or part with information. However, this is an industry-wide concern.<sup>19</sup> Every service provider has the capability to scan individuals' messages and store them.<sup>20</sup> Gmail possesses a monopoly only in using this scan technology for marketing. Any other kind of use is open to all its competitors as well.

#### 5. User Profiles

Service providers like Google have branched out successfully into so many manifestations of cloud computing applications that a single user will often have information relating to almost every aspect of his life – social, economic, professional – on the service provider's servers.

Using cookies and IP co-relation, Gmail has the power to create profiles of individual users based on their search history and email content or subject-matter.<sup>21</sup> While there is no evidence regarding this proposition, Google does not rule out the possibility of doing so in its Terms of Service or other policy statements. However, the likelihood of Google's abusing this power is extremely low considering the enormous losses that would accompany any leakage or misuse of information – not only in the form of legislative clamp downs and due process of law, but in terms of loss of trust of users, which would be catastrophic.<sup>22</sup> Gmail is not alone in having the

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18. *United States v. Charbonneau*, 979 F.Supp.1177, 1184 (S.D. Ohio 1997).

19. YANG, *supra* note 2, at 3.

20. *United States v. Bach*, 310 F.3d 1063 (8th Cir. 2002).

21. *Complaint: Google Inc – Gmail email service*, PRIVACY INTERNATIONAL (April 19, 2004), <http://www.privacyinternational.org/issues/internet/gmail-complaint.pdf>.

22. See also K. A. Oyama, *E-mail Privacy after United States v. Councilman: Legislative Options for Amending ECPA*, 21 BERKELEY TECH. L. J. 499, 510 (2006).

power to build user profiles. Google's competitors like Yahoo and Microsoft also have terms in their privacy policy allowing them to collect user information and use it for marketing purposes.<sup>23</sup> In fact, Gmail's terms are much more precise. Also, after the change in policy to randomize and anonymize the cookie-IP information, Gmail now retains individually identifiable user data for shorter periods than its competitors.<sup>24</sup> So this is an industry wide concern, not a Gmail specific concern.

## V. BUT EXISTING LAWS DO NOT DISALLOW TARGETED ADVERTISEMENT

While there is no specific provision under the Indian law to address the issue, the United States and the European Union do have relevant data protection and privacy laws. In the United States, to facilitate the scanning of emails for spam and virus protection, judicial interpretation of the Stored Communications Act and the Electronic Communications Act exempted email service providers from falling within the norms of privacy violation.<sup>25</sup> Despite the enactment of a very specific law in California to regulate this technology, the benefit of anti-spam and anti-virus technology overrode the concerns about user-privacy invasion during its framing, creating enough leeway for Gmail to continue with targeted ads.<sup>26</sup> The cost-benefit analysis clearly induced the law to allow this technology, without precluding the need for pre-emptive regulation for any future misuse of the power. Similarly, a practical and contextualized interpretation of EU Data Protection Laws does not implicate Gmail for privacy violation based on its current practices.<sup>27</sup>

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23. *Yahoo Privacy Centre*, YAHOO COMPANY INFO, <http://info.yahoo.com/privacy/us/yahoo/details.html> (last visited on July 13, 2010).

See also, *Microsoft Online Privacy Statement*, MICROSOFT CORPORATION, BE WHAT'S NEXT, <http://privacy.microsoft.com/en-us/fullnotice.mspx> (last visited on July 14, 2010).

24. *Privacy FAQ*, GOOGLE PRIVACY CENTER, [http://www.google.com/privacy\\_faq.html#toc-protect](http://www.google.com/privacy_faq.html#toc-protect) (last visited on July 15, 2010).

25. MILLER, *supra* note 14, at 1636.

26. MILLER, *supra* note 14, at 1610.

27. See *supra* text accompanying note 21.

See also, *supra* text accompanying note 6.

See also, *supra* text accompanying note 8.

## VI. CONCLUSION

The debate over Gmail has more to do with potential problems of privacy and individual rights posed by technology in future than in present. The possibility that our lives might be 'run' by an omnipresent Google is what is really keeping privacy advocates up at night. Information, after all, *is* power. However, we ought to recognize that social and hence legal standards of acceptability are constantly evolving. Legal concerns surrounding technology are healthy catalysts for debate and may even pre-empt undesirable developments in technology, but must not attempt to crush change by imposing rigid notions or without situating the development in terms of utility and pragmatism. The prevailing combination of legal regulation and self-regulation seems sustainable - provided the gap between innovative technology and law is narrowed to suit the needs of ever evolving and ever widening society.

